80-1003

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL CONSTRUCTION COMPANY,
A DIVISION OF DANIEL INTERNATIONAL CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS FOR REVIEW

I.

Whether the Court of Appeals erred in its determination that Supervisor Michael Johnson was unlawfully terminated for engaging in union activity?

II.

Whether the Court of Appeals erred in allowing untimely unfair labor practice allegations to be added as amended charges?

III.

Whether the Court of Appeals erred in enforcing that portion of the National Labor Relations Board's order which directed that an election be held absent the requisite 30 percent showing of interest?

IV.

Whether the Court of Appeals erred in its determination that employees were coercively interrogated by members of management?

TABLE OF CONTENTS

	Page
Questions for Review	(i)
Table of Contents	(iii)
Table of Authorities	iv
Prayer	1
Opinions Below	1
Jurisdiction	2
Statutes and Regulations Involved	2
Statement of the Case	5
Argument	8
Conclusion	24
Appendix A—Opinion and Judgment of the Fourth Circuit Court of Appeals	A-1
Appendix B—Decision and Order of the National Labor Relations Board	B-1
Appendix C—Administrative Law Judge's Decision	C-1

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TABLE OF AUTHORITIES

Cases	Page
Corrie Corp. v. *NLRB*, 375 F.2d 149 (4th Cir. 1967)	22
Dallas General Drivers v. *NLRB*, 389 F.2d 553 (3rd Cir. 1968)	13
H. V. Elson Bottling Company, 379 F.2d 223 (6th Cir. 1967)	18
Johnnie's Poultry Co., 146 NLRB 770 (1964)	21-23
Lancaster Osteopathic Hospital, 246 NLRB No. 96 (1979)	20
Loray Corporation, 184 NLRB 557 (1970)	18
NLRB v. *Adam and Eve Cosmetics*, 567 F.2d 723 (7th Cir. 1977)	11
NLRB v. *Air Control Products*, 335 F.2d 245 (5th Cir. 1964)	20
NLRB v. *Budd Manufacturing Company*, 169 F.2d 571 (6th Cir. 1948)	8, 10, 11
NLRB v. *Burnup and Sims*, 379 U.S. 21 (1964)	9, 13
NLRB v. *Gaynor News*, 197 F.2d 719 (2nd Cir. 1952) *aff'd sub nom. Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954)	9, 14-17
NLRB v. *Osbrink*, 218 F.2d 341 (9th Cir. 1955), *cert. denied*, 349 U.S. 928 (1955)	9, 15-17
NLRB v. *PB&S Chemical Co.*, 567 F.2d 1263 (4th Cir. 1977)	10, 21-24
NLRB v. *Universal Camera Corp.*, 340 U.S. 474 (1951)	12
NLRB v. *Welcome-American Fertilizer*, 443 F.2d 19 (9th Cir. 1971)	18
Taylor Brothers, Inc., 230 NLRB 861 (1977)	11

Statutes and Regulations

National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*	
§ 7	2, 14
§ 8(a)(1)	2, 7, 10, 16, 21
§ 8(a)(3)	2, 7, 16
§ 9(c)(1)(A)	2, 19
§ 10(b)	3, 14, 16
§ 10(e)	3, 8
§ 10(f)	4, 8
§ 14(a)	5, 8, 11
28 U.S.C. § 1254(1)	2, 5, 8
29 C.F.R. § 101.18(a)	2, 5, 17

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Daniel Construction Company (herein "Daniel"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on September 23, 1980.

OPINIONS BELOW

The order of the Court below entered on September 23, 1980 was accompanied by an unreported memorandum opinion (App. A pp. A1-A-5). The opinion of the National Labor Relations Board (App. B pp. B1-B-3) is reported at 244 NLRB No. 106 (1979).

JURISDICTION

The judgment of the Court of Appeals was rendered on September 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* (the "Act") and of 29 C.F.R. § 101.18(a) are set forth below, as is 28 U.S.C. § 1254(1) in its entirety:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).
>
> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7; . . .
> >
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .
>
> Section 9(c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> > (A) by an employee or group of employees or any individual or labor organization acting in

their behalf alleging that a substantial number of employees

(i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) or

(ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); . . .

Section 10(b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such a person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

Section 10(e). The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts

business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, U.S.C. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

Section 10(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, U.S.C. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Sec. 14.(a). Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

29 C.F.R. § 101.18(a). . . . The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees. . . .

28 U.S.C. § 1254(1). Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

STATEMENT OF THE CASE

Daniel Construction Company, a division of Daniel International Corporation, is the prime contractor for the construction of the V. C. Summer Nuclear Station at the Fairfield Pump Storage near Jenkinsville, South Carolina. The project is being built "open shop". Daniel itself has not signed pre-hire agreements with the unions claiming jurisdiction in the area, although some of the other contractors on the project have such contracts. The project employed approximately 300 ironworkers during the spring and early summer of 1976.

The executive board of the local ironworkers union in 1976 voted to organize the job by instructing union members to seek jobs on the project. There were several officers and committee members of the local employed as supervisors at the project, including Michael Johnson, who along with several other supervisors subsequently engaged in card solicitation for the union. Michael Johnson was a union member and a member of the union's organizing committee. Johnson, among other supervisors, was terminated for this activity. It is interesting to note that, illustrative of Daniel's good faith in terminating supervisors for union activity, those supervisors who were believed to be engaged in union activity and were consequently terminated were later reinstated upon Daniel's discovery that they had not been so engaged.

Shortly after the union filed its petition for election based on the authorization cards improperly solicited by the supervisors, Daniel, attempting to follow usual Board procedure, asked the Regional Director for a collateral investigation of the showing of interest. The request was supported by voluntary statements proving that several supervisors had indeed solicited union cards. The Regional Director refused to investigate and said he would accept each card submitted unless Daniel gave him a sworn statement proving the particular card invalid. Because of the refusal to investigate by the Regional Director, Daniel began its own investigation for what the Board later conceded was a legitimate purpose. The investigation consisted of questioning employees with each interviewer following a written procedure and asking only questions related to supervisory card solicitation. The introductory statement recited and questions asked were as follows:

> "I must ask you some questions which are very important to this Company in the presentation of a legal defense to the NLRB. You may refuse to an-

swer and no reprisals will be taken against you as a result of this interview.

1. Did any supervisor ask or attempt to persuade you to sign a union card? (if "no", end the interview)
2. What was said to you?
3. Did you sign a card?

The union's petition for an election among the ironworkers at the project was filed on June 2, 1976. In late June, the Regional Director for the Regional National Labor Relations Board office contacted the union, advising it that it did not have the requisite 30 percent figure showing of interest from the ironworkers (determined by the number of authorization cards signed and presented by the union to the regional office) to justify conducting an election. This was true in spite of the fact that, as previously mentioned, supervisors had actively and illegally participated in card solicitation attempts. The union was given ten days to submit additional cards before their petition would be dismissed. In its access, the union had the addresses of all the ironworker employees who had previously signed cards, including those whose cards had been dismissed. As a result of the employees' refusal to sign the cards, the Regional Director dismissed the union's petition on July 8, 1976 for failure to provide a sufficient showing of interest.

An unfair labor practice charge was timely filed by the union on August 12, 1976, alleging that certain named employees had been discharged in violation of Sections 8(a)(1) and (3) of the Act. This charge was amended several times, using the same language, to add or delete names of other terminated employees and supervisors. Six of those terminations recited in the amended charges had occurred more than six months before the filing of the charges. The six individuals named in the amended charges, Vincent, Jaynes, Dickey, Roy, Porter and Queen

were discharged after Daniel was aware that the union campaign had failed and that the petition for an election would be dismissed. These six discharges occurred under different factual circumstances and were for different reasons than the discharges named in the original timely filed charge. In attempting to defend these untimely filed charges, Daniel was unable to find witnesses who could clearly remember the facts surrounding the discharges.

The Administrative Law Judge issued his decision in the case on November 23, 1977. The National Labor Relations Board affirmed the Administrative Law Judge's decision on August 29, 1979. Pursuant to § 10(e) of the Act, the National Labor Relations Board sought to enforce the order in the Fourth Circuit Court of Appeals while pursuant to § 10(f) of the Act, Daniel sought review of the Board order in the Fourth Circuit Court of Appeals. The decision and order of the Board was affirmed by the Fourth Circuit Court of Appeals on September 23, 1980 and this petition for certiorari was then timely filed by the petitioner pursuant to 28 U.S.C. 1254(1).

SUMMARY OF THE ARGUMENT

I.

This case merits review by this Court on certiorari because the decision of the Court of Appeals is in direct conflict with § 14(a) of the National Labor Relations Act and the decisions in other circuits including the decision of the Court of Appeals for the Sixth Circuit in *NLRB* v. *Budd Manufacturing Company*, 169 F.2d 571 (6th Cir. 1948) in that it finds the discharge of a supervisor for participation in union activities to be unlawful. Furthermore, the burden of proof imposed by the Fourth Circuit on the employer in proving the lawfulness of a supervisory discharge is inconsistent with the

decision of the United States Supreme Court in *NLRB* v. *Burnup and Sims*, 379 U.S. 21 (1964). The holding of *Burnup and Sims* provides that when an employee is discharged for alleged misconduct while actually engaging in protected activity, proof of his innocence alone will transform the discharge into an unfair labor practice. The burden of proving the innocence or guilt of *supervisors* was never meant to be governed by the holding of *Burnup and Sims.*

II.

This case merits review by this Court on certiorari because the decision of the Court of Appeals is in conflict with the decisions in other circuits including the decision of the Court of Appeals for the Second Crcuit in *NLRB* v. *Gaynor News*, 197 F.2d 719 (1952) *aff'd sub nom. Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954) and the decision of the Ninth Circuit in *NLRB* v. *Osbrink*, 218 F.2d 341 (9th Cir. 1955), *cert. denied*, 349 U.S. 928 (1955). The conflict lies in the fact that untimely filed charges in this case were held to "relate back" to the original timely filed charge with *NLRB* v. *Gaynor News*, *supra*, cited as precedent. In *Gaynor News*, however, only the number of discriminatorily discharged employees was altered by relating back the untimely filed charges, all the discharges occurring under the same set of circumstances, while in this case the charges were not related in any way by circumstance. Furthermore, according to *NLRB* v. *Osbrink*, *supra*, enlarged charges must stand or fall upon the evidence as to the violations originally charged and in the instant case independent evidence would be necessary to defend the untimely filed charges.

III.

This case merits review by this Court on certiorari because this Court needs to settle the question whether or

not an order of the National Labor Relations Board directing that an election be held without a showing of interest by the union should be enforced.

IV.

This case merits review by this Court on certiorari as this Court needs to settle a federal question concerning the coercive interrogation of employees. The Fourth Circuit found the petitioner's interrogation to be coercive and therefore an 8(a)(1) violation. In fact, no actual coercion was proven nor were any conjectures advanced by the Judge as to the probable coercive effects resulting from the investigatory questioning. By so doing, the Fourth Circuit totally disregarded a prior Fourth Circuit decision, *NLRB* v. *PB&S Chemical*, 567 F.2d 1263 (4th Cir. 1977). If the decision in the instant case is allowed to stand it would constitute a conflict in the Fourth Circuit's own reasoning concerning an important federal question.

ARGUMENT

I.

The Fourth Circuit adopted the Board's finding in this case that Michael Johnson, a supervisor at the project, was discriminatorily discharged in violation of Section 8(a)(1) of the National Labor Relations Act. Proof of the innocence of Johnson was sufficient in the Court's eye to warrant its determination that an unfair labor practice had occurred.

The Court of Appeals for the Sixth Circuit expressed the previously recognized state of the law concerning supervisory discharges in *NLRB* v. *Budd Manufacturing Co.*, 169 F.2d 571 (6th Cir. 1948) when it said:

> We believe it is clear that Congress intended by the enactment of the Labor-Management Relations

> Act that employers be free in the future to discharge supervisors for joining the union, and to interfere with their union activities.

One of the changes to the National Labor Relations Act itself in 1948 was the addition of Section 14(a) which reads in pertinent part,

> . . . No employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

The Court in *Budd Manufacturing Co., supra,* stated that it was clear that the amendment was intended to provide the freedom for employers to lawfully discharge supervisors for engaging in union activities. It was further pointed out that historically foremen in the construction industry have allied with management during industrial conflict. It is therefore only appropriate that the protection of the Act should not extend to their union activities, such activities generally being contrary to the interests of management. The Board itself has recognized that supervisors may lawfully be terminated for their union activity. In fact, in *Taylor Brothers, Inc.,* 230 NLRB 861 (1977) the Board concluded that an employer could lawfully discharge a supervisor on the basis of a mistaken belief that he had engaged in union activity. The Seventh Circuit in *NLRB* v. *Adam and Eve Cosmetics,* 567 F.2d 723 (7th Cir. 1977) also unequivocally upheld the discharge of a supervisor for his pro-union activities. This is in conformity with the general rule that allows for supervisory discharges as a result of union activities.

Upon a review of the record, it should have been obvious to the Board that not only did Daniel *believe* that Johnson was improperly engaging in union activities but that Johnson was *in fact* improperly engaging in union activities. Instead, the Board, ignoring the fact that a belief, even if mistaken, of union activities on the part of

supervisory personnel justifies a discharge, found that Johnson was still an employee while engaging in card solicitation and therefore his resultant discharge was unlawful. The basis for the incorrect finding lies in a miscalculation of dates by the Board. In reviewing the evidence from the record as a whole, substantial evidence does not permit the finding that Johnson was not a supervisor when he engaged in union activities. *See NLRB* v. *Universal Camera Corp.*, 340 U.S. 474 (1951). Johnson testified that he was made foreman two weeks prior to his termination of June 7, 1976. Therefore, Johnson became a supervisor fourteen days prior to June 7 which would be Monday, May 24, 1976. An employee stated in an affidavit that Johnson had asked the employee to sign an authorization card "on a Tuesday after the safety meeting a couple of weeks ago" and also "two or three days later." Fourteen days prior to June 11, 1976 (the date of the affidavit) is Friday, May 28, 1976, which is obviously subsequent to May 24, the date Johnson was made a foreman. If the Board's conclusion were to prevail, the Tuesday and Thursday in the week prior to Johnson's promotion would be a total of 21-24 days (over three weeks) prior to the employee's June 11 affidavit. The Board's calculation and conclusion is clearly contrary to the evidence.

In this case, the Board and subsequently the Court rejected the contention that Daniel's belief, even if mistaken, that Michael Johnson had engaged in union activity after he had become a supervisor was a sufficient defense. The legal effect of Daniel's good faith belief is not discussed. Instead the Board adopted and the Court enforced the Administrative Law Judge's conclusion that:

> Michael Johnson's situation is, however, distinguishable from that of Grant and the other supervisors. The evidence which I have credited establishes that Johnson engaged in no union activity sub-

> sequent to his assumption of a supervisory position. His union activity occurred while he was still an employee and under the Act's protection. That protection must continue until after he becomes a supervisor or it is rendered nugatory. Moreover, it could not help but discourage employee union activity to observe retribution being visited upon a supervisor for the protected activity engaged in while an employee, particularly where, as here, employees move freely and frequently from rank and file to supervisory positions.

The Court's enforced order is based upon a conclusion that proof of Johnson's innocence is by itself enough to prove an unfair labor practice. No other reported decision upholds the proposition that where a supervisor is discharged for alleged union activity, mere proof of his innocence alone is enough to establish an unfair labor practice. Rather, the United States Supreme Court ruled that such a strict standard was required where an *employee* was discharged for alleged misconduct while actually engaging in protected activity. *NLRB* v. *Burnup and Sims*, 379 U.S. 21 (1964). However, that standard applies only to employees. It has not previously been applied to employees after they have been promoted to supervisor. In a *Burnup and Sims* factual setting the initial burden is on the employer to show good faith and upon that showing the burden shifts to the General Counsel to prove the innocence of the employee. *Dallas General Drivers* v. *NLRB*, 389 F.2d 553 (3rd Cir. 1968). The discharge of supervisors for engaging in union activity was never intended to be governed by the reasoning or the holding of *Burnup and Sims*, however, the Fourth Circuit, in adopting the Board's order, apparently applied the *Burnup and Sims* test for employee discharges to a situation where no employee discharge was involved. In the General Counsel's brief, *Burnup and Sims* was the only decision cited to support the argument that Supervisor Johnson was unlawfully terminated.

II.

The instant decision of the Fourth Circuit concerning the 10(b) limitations issue is in conflict with the decision of the Second Circuit in *NLRB* v. *Gaynor News*, 197 F.2d 719 (2nd Cir. 1952) *aff'd sub nom.; Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954). Interestingly, in its opinion, the Fourth Circuit cited *Gaynor News* as precedent for its treatment of the limitations issue. Furthermore, as a result of the Fourth Circuit's misinterpretation of the holding in *Gaynor News*, conflict exists between the instant decision and the decisions in other circuits as well. These decisions all concern the so-called "relating-back" doctrine which allows for amendment of an unfair labor practice charge more than six months after the commission of the alleged unfair labor practice.

Section 10(b) of the Act reads:

> No complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

In *Gaynor News*, *supra*, the amended charge was held by the Second Circuit to legitimately relate back to the original charge. The original charge alleged, in part, that the employer interfered with the employees in the exercise of their Section 7 rights by discriminating in regard to hire and tenure. More than six months after the date of the alleged violation, the charge was amended to allege the discharges of particular employees. In finding that the amended charge did relate back, or "define more precisely" the original charge, the Court stressed that the violation and the facts surrounding it remained the same as in the original charge—only the number of discriminatees was altered. In light of these overlapping facts, the Second Circuit found that no prejudice would

result to the employer in preparing its defense if the amended charges were allowed to stand.

The conflict between the result reached by the Fourth Circuit and the *Gaynor News* decision lies in the fact that the number of alleged discriminatees alone was not altered by the amended charge in the instant case as it was in *Gaynor News*. Instead, the amended charges dealt with discharges occurring over a period of several weeks with no common factual situation as a thread to relate the amended charges to the original charge. The discharges in the amended charges were for different reasons than the discharges contained in the original charge and were effectuated by different supervisors. The judge attempted to circumvent the factual dissimilarities by finding a liason between the discharges in that all occurred during the same organizational campaign. The record shows that prior to the dates of discharge of these individuals, Daniel was aware of the fact that the union campaign had failed and that the union's petition for an election would be dismissed. The campaign was over when those individuals named in the amended charges were discharged and in no way could their discharges be said to be in the course of a single organizational campaign. Therefore, to allow an amended charge unrelated to the facts of the original charge in any way is directly contra to the mandate of *Gaynor News* that there first be a relation between the violation and the facts in the original and amended charges. We submit that the decision of *Gaynor News* never was meant to relate charges under factually dissimilar circumstances.

Furthermore, the Fourth Circuit's treatment of this issue is in direct conflict with a decision of the Ninth Circuit, *NLRB* v. *Osbrink*, 218 F.2d 341 (9th Cir. 1955) *cert. denied* 349 U.S. 928 (1955) which stands for the proposition that an enlarged charge must stand or fall upon the evidence as to the violations originally

charged. In *Osbrink*, original charges were made against an employer pursuant to the timeliness requirement of Section 10(b). These charges were limited to the discharge of and discrimination against employees in violation of Sections 8(a)(1) and 8(a)(3). An amended charge on March 4, 1952 was later incorporated into the complaint, alleging specific 8(a)(1) violations such as threats and coercive questioning. It was alleged that these violations began in November 1951 and continued to date, placing them beyond the six months limitations period enunciated in Section 10(b). The complaint was filed on July 25, 1952, more than six months after the alleged occurrence of the incident. The Ninth Circuit cited *Gaynor News* for its definition of the "relating back" theory and then stressed that the evidence used either to prove or defend the original charge should be the same evidence as is used to prove or defend the amended charge. In order for charges to truly "relate back" the enlarged charge must stand or fall upon the evidence as to the violations originally charged. If the factual situation of the original charge and the amended charge are the same, the tests of *Osbrink* and *Gaynor News* are met because to successfully employ evidence necessary for litigation of the original charge when litigating the amended charge, the facts would have to be the same. Unquestionably, evidence to defend the allegedly unlawful discharges cited in the six amended charges in the instant case would be independent of the evidence needed for defending the discharges of the original charge.

This concern leads to discussion of a further conflict between the Fourth Circuit's reliance on the decision in *Gaynor News* for a precedent, particularly with the accompanying logic of *Osbrink* kept in mind, and the actual treatment of the issue by the Fourth Circuit. The Second Circuit in *Gaynor News* indicated an uncompromising respect for the lack of prejudice to the employer in the preparation of its defense. If the amended charges do

not, in fact, meet the *Gaynor News* and *Osbrink* standards of factual oneness, the employer could not use evidence gathered for the preparation of his defense of the original charge in his defense of the amended charge. Because of the untimely filing of charges in this case, it was impossible for the petitioner to adequately defend itself. By the time the late charges were filed, witnesses could not be found and memories of the circumstances surrounding the six amended charges were cloudy. By allowing these charges, the Board totally subverted the purpose of the time limitation in the Act as well as the holdings of *Gaynor News* and *Osbrink*.

III.

This case merits review by this Court on certiorari as this Court needs to settle the question of whether or not, absent any valid showing of employee support for the union, the National Labor Relations Board may abrogate its established policy requiring a 30 percent showing of interest and order an election. The issue is important because it involves a question of employee rights under the National Labor Relations Act.

The showing of interest requirement is a Board policy used in determining whether a question of representation exists. The policy is set forth at 29 C.F.R. § 101.18(a) which reads in pertinent part:

> . . . The evidence of representation submitted by the petitioning labor organization or by the persons seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors, the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.

Proof of the 30 percent interest must be submitted within 48 hours after the petition is filed. The Regional Director with whom the petition has been filed, upon receipt, makes a preliminary investigation and determines whether there is reasonable cause to believe that a question of representation exists.

The Fourth Circuit adopted that portion of the Board's order which provided for an election without any showing of interest by the union among the ironworkers at the project. The Board's decision in *Loray Corporation*, 184 NLRB 557 (1970) was cited by the Board in the instant case for the proposition that a showing of interest need not be ascertained, as is normally required by National Labor Relations Board Rules and Regulations, for a National Labor Relations Board election ordered as part of a remedy. In *Loray*, *supra*, however, a valid showing of interest had previously been made before the cancellation of the election. Therefore, the union had in fact demonstrated the requisite 30 percent showing of interest. Furthermore, the controlling precedent cited in *Loray*, *H. W. Elson Bottling Co.*, 379 F.2d 223 (6th Cir. 1967) also involved a situation where the union had clearly demonstrated a 30 percent showing by authorization cards submitted to the Regional Director. None of the decisions which are cited as controlling precedent for the issue involve the issue.

So far as we can determine, no Board or Court decision has addressed the specific issue of requiring a showing of interest prior to a remedial election where no showing has ever been made of union support. The Ninth Circuit in *NLRB* v. *Welcome-American Fertilizer*, 443 F.2d 19 (9th Cir. 1971) however, did state that: "[w]hen administrative agencies promulgate rules or regulations to serve as guidelines, these guidelines should be followed. Failure to follow such guidelines tends to cause unjust discrimination . . . contrary to fundamental concepts of

fair play and due process." 443 F.2d at p. 20. We submit that the failure of the Board in this case to follow its own guidelines concerning showing of interest requirements will constitute a total disregard for the petitioner's constitutional rights of due process.

The Board's authority to act upon representation petitions of labor organizations is encompassed in Section 9(c)(1)(A) which reads as follows:

> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) By an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees
>
> (i) wish to be represented for collective bargaining and their employer declines to recognize their representative as the representative defined in subsection (a) of this section or
>
> (ii) asserts that the individual labor organization which has been certified, or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section.

The only standard prescribed by the statute for evaluating a petition is that: "a substantial number of employees . . . wish to be represented." The 30 percent showing of interest policy of the Board is used to enable it to determine, if in fact, a substantial number of employees desire representation. It is understandable why no 30 percent showing of interest was required in the cases cited as precedent for the Fourth Circuit's enforcement of the instant election. Previous showings of interest had been made which indicated that indeed a substantial number of employees were interested in union representation. In the case at bar, however, no 30 percent

showing had ever been made. If the election is ordered without any showing of interest ever required, would not the statutory mandate of determining that a substantial number of employees desire representation be circumvented by the Board's own refusal to follow the appropriate procedure? We submit that the answer is "Yes", but there is a need for this Court to clearly express it.

Furthermore, the Board had earlier dismissed a petition of the same union on July 9, 1976 on the basis that the 30 percent showing had not been made. In ordering an election as part of their remedy, the Board now not only fails to follow its own internal procedures in requiring a 30 percent showing of interest to determine whether a substantial number of employees desire representation but also reverses itself on its earlier finding of a lack of a 30 percent showing. Only recently, in *Lancaster Osteopathic Hospital*, 246 NLRB No. 96 (1979) the Board indicated that it would adhere strictly to the validity of prior showings of interest. In that case, the employer desired an updated showing of interest in light of the fact that assertedly 41 percent of the unit employees were no longer employed by the employer. The Board refused to recheck the 1977 showing of interest despite the passage of two years. As an alternative to our position that a positive showing of interest should be made in this case, we submit that in light of the holding in *Lancaster Osteopathic*, the Board is bound by the prior negative showing of interest of the union in this case.

In refusing to deny enforcement of the order of election absent a proper showing of interest, the Fourth Circuit indicated that an administrative decision of the Board concerning showing of interest was non-reviewable. It based this conclusion on the holding in *NLRB* v. *Air Control Products, Inc.*, 335 F.2d 245 (5th Cir. 1964). This is unwarranted as the holding of the Fifth Circuit in *Air*

Control Products, supra did not attempt to go so far. It merely enunciated the general principle that neither the employer nor the union can litigate the Board's administrative determination as to the *validity* or *finding* of the showing of interest. That is admittedly not in dispute in this case. Rather, the *failure to require* any requisite showing of interest is the issue and therefore inquiry into the issue is not foreclosed by the *Air Control Products* decision.

IV.

The Fourth Circuit adopted the Board's finding that management representatives had coercively interrogated employees, a violation of Section 8(a)(1). Another decision by the Fourth Circuit, *NLRB* v. *PB&S Chemical*, 567 F.2d 1263 (4th Cir. 1977) was apparently overlooked. If the decision in the instant case were allowed to stand, conflict within the Fourth Circuit's own reasoning concerning a federal question would exist.

The decision reached in the instant case involves the application of the *Johnnie's Poultry Co.*, 146 NLRB 770 (1964) safeguards as to the questioning of employees by management. These safeguards generally require a legitimate purpose in asking the questions, assurances against reprisals, and interrogation which does not exceed the realms of legitimate inquiry.

In *PB&S Chemical Co., supra*, a case factually similar to the case at bar, a member of management questioned employees as to whether they had been coercively led to sign union authorization cards by other employees. The questioning was in response to rumors concerning the use of threats by employees as a card solicitation tactic. As in the instant case, employees were asked by management whether they had signed union cards, such information being needed to determine the legality behind the solicitation of cards. The management official in *PB&S*

Chemical assured the employees against reprisals and told the questioned employees that their responses would be voluntary. In the instant case, as well, interview cards were possessed and used by the interrogating management officials, the cards clearly reciting the *Johnnie's Poultry* safeguards of assurances against reprisals and voluntary participation. Unlike the decision in our case, however, the Fourth Circuit in *PB&S Chemical* reversed the Board's finding of coercive interrogation, stating that the gravamen of the violation, intimidation, had not been proven and that legitimate purpose existed for the questioning.

The conflict between the instant Fourth Circuit decision and the decision of the Fourth Circuit in *PB&S Chemical* is apparent. No intimidation was ever alleged, much less proven in the instant case. Furthermore, a legitimate purpose existed for the questioning, which the Board in this case conceded. The standards recited above used for reviewing the propriety of interrogation, enunciated by the Fourth Circuit in *PB&S Chemical*, mistakenly did not control the disposition of the interrogation issue in the instant case. *See Corrie Corp.* v. *NLRB*, 375 F.2d 149 (4th Cir. 1967). The only specific conclusions of the Administrative Law Judge, adopted by the Board and enforced by the Fourth Circuit, were that the questioning had exceeded the bounds of permissible inquiry, specifically by the questioning of the employees as to whether they had signed cards, and that in at least some instances the assurances against reprisals had not been given to the questioned employees.

As to the first conclusion—questioning as to whether union cards had in fact been signed as being beyond the realm of legitimate inquiry—the holding of the Fourth Circuit is contra to the holding of *PB&S Chemical*. In the latter case, the Fourth Circuit disagreed with the Board's conclusion that the interrogation had exceeded

the bounds of lawful inquiry by asking whether union cards had in fact been signed by the questioned employees. The Board had reasoned that the only proper questioning would have concerned the presence or absence of threats by fellow employees and that whether cards had indeed been signed as a result of the threats was immaterial. In refusing to enforce this portion of the Board's order, the Fourth Circuit held that the line of questioning was pursuant to a legitimate purpose, regardless of the motive, and was non-coercive in light of the fact that no intimidation was proven.

The Fourth Circuit in the instant case viewed this same line of questioning as beyond the realm of legitimate inquiry, seemingly aligning itself with the holding of the Board which was denied enforcement in *PB&S Chemical*. The presence of legitimate purpose behind the questioning was overlooked. Obviously, in order to ascertain the extent as well as the effect of supervisory participation in card solicitation, it is necessary to ask whether cards have in fact been signed. It is the only method of determining whether employees have responded to the supervisory taint. Furthermore, the Regional Director, in refusing to conduct an investigation which in turn prompted the "in-house" investigation, required affidavits attesting to the invalidity of each card submitted by the union before any individual card could be invalidated. The only method of invalidating a card is to first discover if it has been signed, by whom, and under what circumstances. As a result of the Fourth Circuit's decision in this case, the legitimate purpose test and its relation to questions directed toward the identity of card signers, applied in *PB&S Chemical* and various other circuits, is now ignored by the same Court and constitutes another reason why conflict results when the two decisions are read together.

Addressing the Judge's finding that in at least some instances, the *Johnnie's Poultry* safeguards were not fol-

lowed, we submit that, assuming *arguendo*, even if no safeguards were provided in some of the instances, the burden of proving intimidation under *PB&S Chemical* has still not been met.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

THOMPSON, MANN AND HUTSON

/s/ Melvin R. Hutson
MELVIN R. HUTSON

/s/ Susan L. Hartzoge
SUSAN L. HARTZOGE

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1560

[UNPUBLISHED]

DANIEL CONSTRUCTION COMPANY,
A DIVISION OF DANIEL INTERNATIONAL CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For Review And Cross-Application For Enforcement Of An Order Of The National Labor Relations Board.

Argued: August 14, 1980 Decided: September 23, 1980

Before FIELD, Senior Circuit Judge, HALL and SPROUSE, Circuit Judges.

Melvin R. Hutson (Thompson, Mann and Hutson on brief) for Petitioner; R. Michael Smith, National Labor Relations Board (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel on brief) for Respondent.

PER CURIAM:

This is an appeal from an order of the National Labor Relations Board (Board) finding that petitioner Daniel Construction Company (Daniel) had violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the Act), 29 U.S.C. §§ 158(a)(1), (3).

Local 413 of the International Association of Bridge, Structural and Ornamental Ironworkers (Union) attempted to organize the ironworkers at Daniel's two-construction sites near Jenkinsville, South Carolina, in 1976. On August 12, 1976, the Union charged Daniel with unfair labor practices in discriminating against and discharging individuals to discourage their union activity. That original charge was amended five times, adding and deleting the names of discharged individuals. The Board's Regional Director issued a complaint based on the charge on November 18, 1976, and an Administrative Law Judge (ALJ) held hearings in May and June, 1977.

The ALJ found that Daniel had violated sections 8(a)(1) and 8(a)(3) by coercively interrogating ironworkers about the Union, threatening employees with lay-off or discharge, requesting an employee to report the union activities of others, transferring to other shifts or discharging employees known or suspected to be affiliated with the union. He concluded that nineteen named individuals had been wrongfully discharged or refused employment. The ALJ ordered, in part, that these employees be hired or reinstated with back pay, that a specified notice be posted at all of Daniel's sites in the continental United States, and that Daniel provide the Union with the names and addresses of all ironworker employees. He also recommended that the Board conduct a representation election at one of Daniel's Jenkinsville construction sites. The Board affirmed the ALJ's findings and con clusions and adopted his recommended order.

Daniel raises three principal issues on this appeal. The company first contends the NLRB erred by allowing the Union to amend its original charges to add six individuals, more than six months after their terminations, in violation of section 10(b), 29 U.S.C. § 160(b). We disagree. Although this court has found a duty to ensure that the Board proceed expeditiously, *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856, 863-64 (4th Cir. 1961), an amended charge filed more than six months after the unfair labor practices is timely "if it relates to an unfair labor practice inherent in or connected with the original charge." *Sunrise Manor Nursing Home*, 199 N.L.R.B. 1120, 1121 (1972). "The 'relating back' doctrine . . . has been liberally construed to give the Board wide leeway for prosecuting offenses unearthed by its investigatory machinery, set in motion by the original charge." *NLRB* v. *Gaynor News Co.*, 197 F.2d 719, 721 (2nd Cir. 1952), *aff'd sub nom., Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954). Daniel's alleged offenses affecting the six individuals added by amendment were clearly related to the substance and pattern of misconduct claimed in the original charge, so the Board acted properly in allowing the amendments.

Second, Daniel contends that there was insufficient evidence to support the Board's rulings on the unfair labor practice charges involving various company actions. Our review of the record convinces us that the ALJ's findings are amply supported by substantial evidence. If the Board's factual findings are supported by substantial evidence we must, of course, affirm them. 29 U.S.C. § 160(e). *See also Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477-91 (1951).

The company contends, finally, that the Board's order was improper in that the remedies for the sections 8(a)(1) and 8(a)(3) violations were either incorrect or excessive. This court has held on a number of occasions

that a reviewing court must give deference to the Board's remedial orders attempting to correct unfair labor practices. *See, e.g., J. P. Stevens & Co.* v. *NLRB*, 612 F.2d 881 (4th Cir. 1980). *Accord, NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n. 32 (1969). The several remedies ordered by the Board fall well within the Board's remedial powers.

Daniel objects particularly to the Board's ordering an election without the usual thirty percent showing of interested workers. The thirty percent criterion is an administrative device of limited purpose—to determine the existence of "a question of representation" as required by section 9(c) of the Act, 29 U.S.C. § 159(c). *Loray Corp.*, 184 N.L.R.B. 557 (1970), 1970 N.L.R.B. Dec. (CCH) ¶ 22, 165; 29 C.F.R. § 101.18 (1979). Courts have specifically and uniformly held that a "showing of interest" is an administrative decision not properly subject to judicial review. *See, e.g., NLRB* v. *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 250 (5th Cir. 1964) (listing cases).

Concluding that the Board's findings of fact are supported by substantial evidence in the record and that its conclusions of law are proper, the Board's decision is affirmed and the order is enforced.

ENFORCED.

APPENDIX B

244 NLRB No. 106

FPT
D-5495
Jenkinsville, SC

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 11-CA-6682

DANIEL CONSTRUCTION COMPANY, A DIVISION OF DANIEL INTERNATIONAL CORPORATION

and

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, AND ORNAMENTAL IRONWORKERS, LOCAL UNION 413, AFL-CIO

DECISION AND ORDER

On November 23, 1977, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs. Respondent filed a brief in answer to the exceptions of the General Counsel and the Charging Party.[1]

[1] The General Counsel filed a Motion to strike the portion of Respondent's brief in answer to exceptions of the General Counsel and the Charging Party to the Administrative Law Judge's Decision. The General Counsel claims that Respondent misrepresented the date on which employee Daniel Haga was reemployed by Respondent and that such date is important for the purpose of determining when Haga became a foreman. Respondent filed an opposition to the General Counsel's motion claiming, *inter alia*, that it had merely restated Haga's testimony. We find no merit in the

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

General Counsel's motion, as there has been no misrepresentation by Respondent and, in any event, the Administrative Law Judge correctly evaluated all the testimony in reaching his conclusions concerning Haga's discharge. Accordingly, we hereby deny the General Counsel's motion to strike.

[2] Respondent, the Charging Party, and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree that John Jaynes was constructively discharged. We reach that conclusion based on the specific threat made directly to Jaynes by Respondent that a pretext would be found to camouflage his discriminatory discharge; the backdrop of Respondent's massive and pervasive unfair labor pracitces; and Jaynes' testimony that he was particularly concerned over a threatened blemish to an untarnished work record stretching back to 1947.

[3] The Administrative Law Judge found that the instant case was inappropriate for the issuance of a bargaining order in the absence of a showing of majority status. In *United Dairy Farmers Cooperative Association*, 242 NLRB No. 179 (1979), we considered the issue of whether a bargaining order remedy is appropriate in situations where a union has never obtained majority support from unit employees. For the reasons set forth in their respective opinions in *United Dairy*, Members Penello and Truesdale deny the

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Daniel Construction Company, a Division of Daniel International Corporation, Jenkinsville, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. August 29, 1979

JOHN H. FANNING, Chairman

JOHN A. PENELLO, Member

JOHN C. TRUESDALE, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

General Counsel's and the Charging Party's requests for a bargaining order.

Chairman Fanning finds that Respondent's flagrant and pervasive violations of the Act warrant requiring it to bargain with the Union. See his and Member Jenkins' dissent in *United Dairy, supra.*

The Administrative Law Judge provided in his recommended Order that Respondent be required to cease and desist from "in any other manner" interfering with, restraining, or coercing its employees in the exercise of their Sec. 7 rights. We recently stated in *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979), that we would impose such a broad order where a respondent "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Considering all the circumstances herein, we are of the opinion that the unlawful conduct engaged in by Respondent warrants the imposition of a broad order.

APPENDIX C

JD-810-77
Jenkinsville, SC

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 11-CA-6682

DANIEL CONSTRUCTION COMPANY, A DIVISION OF DANIEL INTERNATIONAL CORPORATION

and

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL IRONWORKERS, LOCAL UNION 413, AFL-CIO

Ronald C. Morgan, Esq. and *Jack Ruby, Esq.*, Winston-Salem, NC, for the General Counsel.

Melvin Hutson, Esq. and *J. Michael Walls, Esq.*, of *Thompson, Mann and Hutson*, Greenville, SC, for the Respondent.

Larry Eubanks, Esq., of *Eubanks and Villegas*, Winston-Salem, NC, for the Charging Party.

DECISION

Statement of the Case

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Rock Hill and Columbia, South Carolina, on 10 days between May 10, and June 2, 1977. The original unfair labor practice charge was filed by the International Association of Bridge, Structural and Ornamental Ironworkers, Local 413, AFL-CIO, herein-

after referred to as the Union or Local 413, against Daniel Construction Company, a Division of Daniel International Corporation, hereinafter referred to as Daniel or Respondent, on August 12, 1976. The charge was thereafter amended on five occasions between September 13 and March 8, 1977. On November 18, 1976, the Regional Director of the 11th Region of the National Labor Relations Board, hereinafter referred to as the Board, issued the complaint herein. That complaint was amended on March 25, 1977 and at hearing. As amended, it alleged that Respondent, in an effort to thwart Local 413's organizational campaign, discriminatorily discharged and/or refused to hire certain ironworker employees and supervisors, and otherwise interfered with the organizational activities, in violation of Section 8(a)(3) and (1) of the Act. General Counsel sought, by way of remedy in addition to reinstatement, backpay, interest (at 9 percent), and an order requiring Respondent to bargain with the Union. The Union joined General Counsel's request for extraordinary remedies and additionally sought organizational and litigation expenses. Respondent's timely filed answer, and its brief, denied the substantive allegations of the complaint and opposed the imposition of any extraordinary remedies.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses. Helpful, comprehensive briefs were filed and have been carefully considered. During the course of the lengthy hearing, I carefully observed the witnesses and their demeanor. Upon the entire record, including my observation of the witnesses, inferences properly drawn from the failure of a party to produce relevant evidence within its control,[1] and consideration of the briefs, I make the following:

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[1] *Martin Luther King, Sr., Nursing Center*, 231 NLRB No. 8 (1977).

Findings of Fact

I. The Respondent's Business and the Union's Labor Organization Status—Conclusions of Law

Respondent is a corporation licensed to do business in the State of South Carolina, where it is engaged as a general contractor in the construction of nuclear power plant and a hydro-electric power plant at Jenkinsville. Jurisdiction is not in issue. Based upon the admitted allegations of the complaint, I find and conclude that Respondent is an employer, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Section 10(b) Defense

In its Answer to Amended Complaint, and on brief, Respondent contended that certain allegations of conduct violative of Section 8(a)(1) and (3) were time-barred pursuant to Section 10(b) of the Act.[2]

The original charge, filed on August 12, alleged that Respondent violated Section 8(a)(1) and (3) of the Act by discharging certain named employees "on May 25,

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[2] Section 10(b) provides, *inter alia*:

> . . . That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.

Specifically, Respondent contended that the allegations of paragraphs 8 and 9 of the amended complaint relating to the discharges of Hugh McCutcheon, Michael Grant, Allan Haga, Daniel Haga, James Walker, Derrell Rice, Roy Collins, Gerald Kerr, Paul Vincent, John Jaynes, Richard Dickey, Kermit Roy, Starks Porter, and Wilber Queen, and certain allegations of interference, restraint and coercion contained in paragraphs 8(d), 8(e), 8(f), 8(i), 8(k), 8(l), 8(m), and 8(n) were time-barred.

1976 and continuing to date" in order to discourage union activity. It also contained the usual printed "catch-all" language.[3] Subsequent amendments to the charges, on September 13, January 13, 1977, February 9, 1977, February 18, 1977, and March 8, 1977, retained identical language and added (or deleted) names on the list of discharged employees and supervisors. Respondent correctly identified those individuals whose names did not appear on a charge until more than 6 months after their terminations.[4]

The law is clear that ". . . an amended charge, although filed more than 6 months after the occurrence of the unfair labor practice, will be timely if it relates to the unfair labor practice inherent in or connected with the original charge." *Sunrise Manor Nursing Home*, 199 NLRB 1120, 1121 (1972). The amendments name the employees discharged in the course of a single organizational campaign. As such, it is clear that they relate to the "unfair labor practice inherent in or connected with the original charge." The same is true for the allegations of various Section 8(a)(1) violations occurring in the course of the same campaign. See *Gulf States Manufacturers, Inc.*, 230 NLRB No. 81 (1977). The charges, I find, were timely filed.

III. Background—The Union's Campaign

Respondent is the general contractor for the construction of the V. C. Sumner Nuclear Station and the Fairfield Pump Storage facility, in Jenkinsville, South Caro-

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[3] "By these and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act."

[4] The names of Hugh McCutcheon and Michael Grant appeared on the original charge, were absent from the first amended charge, and reappeared on the second amended charge, dated January 13, 1977.

lina.[5] Respondent deems itself an "open shop" contractor and had neither contracted with nor recognized any unions as representing its employees on these projects. Included among its employees were as many as 500 ironworkers, of whom approximately 300 were working on the Sumner project in spring and early summer, 1976.[6]

In January and February, representatives and members of Local 413 considered launching an organizational drive among Daniel's ironworkers. At the suggestion of Bobby Fowler, the Union's business agent, Thomas Steen hired on as a rigger in mid-January. Steen was promoted to the position of miscellaneous ironworker foreman after about 2 weeks. Following Steen's reports to the Union's executive board, a decision was made to attempt to "load up" the job with union members and get a representation election. On May 3, Ralph Tucker, Local 413's president, was hired as a reinforcement (rebar) steel foreman. He reported to Bill Long, rebar superintendent, who was also a union member. Tucker became the head of the Union's organizing committee at the jobsite. The committee was made up of 18 or 20 individuals, some of whom, like Steen, were foremen. It was stipulated that those occupying the positions of foreman and above were statutory supervisors. Beginning in early May, the organizing committee began to distribute authorization cards and solicit signatures thereon. Many of the cards were solicited directly or indirectly by Tucker, Steen and several other supervisors. The cards were returned to the Union, generally through Tucker.

On June 2, the Union filed a representation petition, Case No. 11-RC-4205, seeking an election at Sumner in a unit consisting of:

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[5] With one exception, all of the unlawful conduct occurred at the V. C. Sumner site, herein referred to as Sumner.

[6] All dates hereinafter are 1976 unless otherwise specified.

> All journeymen and apprentice ironworkers, including rodmen, finishers, riggers, machinery movers, erectors, sheeters and welders, but excluding all other employees, guards, watchmen and supervisors as defined in the Act.

On the same date, the Union mailed a demand for recognition to Daniel at its Greenville, South Carolina headquarters. On June 7, Respondent's attorneys replied, rejecting the demand.

A hearing on the Union's petition was held on June 18. In the latter part of June, the Union was advised that it was 12 authorization cards short of satisfying the Board's 30 percent showing of interest requirement, necessary for an election.[7] Although it made efforts to do so, the Union was unable to come up with the additional valid authorization cards. Its petition was dismissed on July 8.

IV. Daniel's Response to the Organizational Efforts—The Unfair Labor Practices

A. *Initial Response*

The Union activity came to management's attention around the third or fourth week in May. According to George Crowder, Daniel's project manager at Sumner, Frank Walker, personnel administrator, informed him that the Ironworkers were engaging in a major organizing effort, about May 24. It became, as stated by Jesse Sellers, ironworkers superintendent, a matter of common knowledge. Crowder discussed it with various Daniel's executives and directed Walker to talk to some of the employees whom Crowder knew and trusted to find out

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[7] NLRB, Statements of Procedure, Section 101.18(a). It is not clear from the record whether this computation of interest showing had excluded those cards of, or solicited by, persons now admitted to be supervisors.

what he could. Similarly, Emmerson Johnson, Respondent's employee relations manager, was sent to the site by its counsel, "[t]o help assess the situation to see how deep the union had got in," to determine how many employees had signed cards and who they were.

B. *Meetings with Supervisors*

Respondent then conducted a series of meetings, informing all of its ironworker supervision of the union activity. These meetings were completed by the end of May or early June, before the petition was filed. According to the testimony of general foremen Donald McCarver and Allen Haga, the supervisors were told of the organizational efforts and Daniel's strong opposition thereto. They were told that if they observed any union activities, they were to report them to higher supervision who, according to McCarver, would "take care of it." They were encouraged to speak to the employees to ask them to vote against the union and they were also instructed to avoid conduct which might constitute interrogation or other interference or coercion. McCarver recalled that they were told never to mention the Union when discharging an employee. In the course of these meetings, the attorneys diagrammed how an unfair labor practice case could be dragged out through the Board and the courts for 4 to 10 years, long enough for the project to reach completion before anything came of the organizational efforts.[8]

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[8] Both McCarver and Haga were alleged in the complaint as supervisors whose discharges violated Section 8(a)(1). They testified as witnesses for the General Counsel. That testimony was credibly offered and was essentially corroborated by that of Crowder. I find that it accurately described Respondent's meetings with its ironworker supervisors.

C. *Interrogation of Ironworkers*

Beginning in late May, Respondent began to question individual ironworkers, in the personnel office, ostensibly to determine the extent of supervisory participation in the organizational efforts. The questioning was conducted by Frank Walker, Emmerson Johnson and Gary Pace. General Counsel contended that this interrogation violated Section 8(a)(1) of the Act; Respondent asserted that its questioning was accompanied by all required safeguards, was necessitated by the Regional Office's refusal to investigate the extent of supervisory taint, and went no further than necessary to accomplish its legitimate ends. Respondent admitted that it questioned many more employees than testified. All of the employees testified that they were told that their participation was voluntary, that they could refuse to answer, and that they would be free from reprisals if they did answer. Employee Wilbur Keith Queen, who was questioned about a week before his June 7 discharge, credibly testified that he was asked if anyone had pressured him to sign a card and whether he had seen anyone on the job soliciting cards. He denied being asked if any supervisor had asked him to sign a card. John Jaynes, questioned around the same time, testified that he was asked if he had signed a card and if he knew the man who was passing them. He admitted that he had signed a card but denied knowing who asked him to do so. He was told this would not be a union job. Roy Collins, questioned by Walker in Johnson's presence, was asked whether he had signed a card, where he got it and whether he got it from a supervisor. Starks Porter was asked, in mid-June, whether he had been pressured into signing a card; he denied being asked whether anyone in a supervisory position had pressured him. William Lominac and Steve Brandon, both questioned at about the same time as Porter, testified that they were only asked about supervisory participation in card signing. Olin White was

questioned by Gary Pace, in late June, a week or 10 days prior to his discharge. He stated that Pace told him that there was union activity going on and asked him if he knew about it, whether he had signed a card, whether he knew anyone who had and whether anyone had approached him to sign. White said that he had been approached but had not signed. Pace asked him if it was a journeyman or supervisor who approached him.

Walker and Johnson testified that they followed the questioning procedure set forth on a card which read:

> I must ask you some questions which are very important to this Company in the presentation of a legal defense to the National Labor Relations Board. You may refuse to answer and no reprisals will be taken against you as a result of this interview.
>
> 1. Did any supervisor ask or attempt to persuade you to sign a union card?
>
> (If "no," end the interview.)
>
> 2. What was said to you?
>
> 3. Did you sign a card?

D. *Discharge of Supervisors*

As Respondent became aware of the identity of its supervisors who were engaged in the union activity, it took immediate action. Each supervisor so involved was terminated for "disloyalty to the Company," i.e., union activity.

The first to be discharged, on May 26, was *Ralph Tucker*, president of Local 413. Tucker's union activity was discussed *supra*, in Background section of this Decision.

On May 26, Tucker was brought to the front office, where he met with a company attorney and another

official. He was asked about morale on the job and reported that the men were discontented because of low wages and other problems. He was asked if he was aware of Daniel's attitude toward organized labor and, when he said that he was not, he was told that while Daniels would not discriminate against anyone for their union membership, it was felt that it was in the best interest of the company and the employees that the employees not be affiliated with a union. He was asked if he could relay this message to the employees in his crew. He offered to memorize it and present it verbatim if they would write it out for him. Tucker was then asked whether he knew of the organizational talk going on. He said that he had heard some talk. He was challenged on his own role in the Union and in the organizing campaign and admitted both. Tucker was sent to speak with Ed Gravat, project manager. As he left toward Gravat's office, he heard them say that they "had better put a stop to this thing before it gains any more momentum. . . ." Gravat discharged Tucker, telling him that there was nothing wrong with his work but that Daniel would not stand for the union business.[9]

Johnny Earls was hired on March 18, and was also a rebar foreman. He was a union member and his membership was known to superintendent Long and possibly to other members of supervision. Earls' crew worked closely with that of Tucker, on the walls of the reactor. Earls signed a union card at Tucker's request. He also took some cards from Tucker to deliver to others. He solicited the members of his crew to sign cards and secured signatures from some of them.

About a week before Earls' May 28 discharge, Gene Miller, a rebar superintendent, asked Earls if he had seen any union cards. He told Miller that he had. On May 28, Earls was called in to the office and discharged

[9] Tucker's testimony stands uncontradicted.

by Walker, Gravat, and Miller. Miller stated that they had proof that Earls had been passing union cards. Gravat told him that they had no choice in the matter, that if the job went union, they would have to close the doors.[10]

Thomas Steen was a miscellaneous ironworker foreman. His leadership role in the union activity is set forth, *supra.* He was discharged for his admitted union activity on June 1.

On June 7, Respondent discharged *Don McCarver*, general foreman and foremen *Fred Wicker, Hugh McCutcheon, Michael Grant* and *Michael Johnson* for their purported union activities.

Donald McCarver was a general foreman in the structural steel department. He had been a Union member for 26 years, a fact known to Bill Long, the superintendent who had hired him. On June 4, McCarver went into Long's office and noticed a list of 30 to 35 names on Long's desk. He recalled only the names of Fred Wicker, Hugh McCutheon, Michael Grant, and his own. On June 7, Wicker, who was a foreman under McCarver, and he were called into the office and told that they were being discharged for organizing for the Union. McCarver denied any such involvement. His only union activity, he testified, was the signing of a union card sometime after the meeting with the attorneys at which the supervisors were told of the union activity. Similarly, Fred Wicker's only union activity consisted of signing a union authorization card.

Within about 4 weeks, Respondent concluded (erroneously, it appears) that Wicker had not engaged in any union activity, and rehired him. On September 28, Wicker left the jobsite to take a planned vacation, allegedly

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[10] Earls' testimony stands uncontradicted.

promised to him. However just prior to leaving he was told that he could not take a vacation. Shortly after leaving, he received a notice that he had been terminated for excess absenteeism. He was again hired, in December, and laid off in a reduction in force on February 24, 1977.[11]

Hugh McCutcheon had been a member of Local 413 until about 10 months prior to his discharge. Although he denied signing an authorization card while employed at Daniel, the record contains a card, (General Counsel's Exh. 56-39) dated May 12, bearing what purports to be his signature, witnessed by employee Keith Queen. On June 7, McCutcheon was told that he was being discharged for having signed a union authorization card.[12]

Prior to his June 7 discharge, Michael Grant had three conversations about the Union with Dean Bentley, his immediate supervisor. About mid-May, Bentley pointed out Ralph Tucker and asked Grant who he was. Grant told Bentley that Tucker was president of Local 413. Bentley said that he had seen Tucker outside the gate, with a group of men. About a week later, Bentley told Grant that he knew that both Grant and McCutcheon had worked for the Union and asked which way they were leaning. Grant told Bentley that he had not signed

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[11] General Counsel amended the complaint to allege that Wicker's June 7 discharge, as well as his subsequent termination, were violative of Section 8(a)(1).

[12] McCutcheon also testified that Frank Walker told him that he was being discharged for not turning in employees who were engaged in union activities. Walker denied making any such statement. Noting that McCutcheon was unable to recall this critical statement until the fourth time he was asked to repeat the conversation, and until he was asked a leading question, and also noting that unexplained conflict between his testimony denying that he signed a card and the existence of such a card in the record, I do not credit McCutcheon.

a card at that time. On the day that Grant was discharged, Bentley came up to Grant, shaking his head, and stated that he would hate to know that Grant had signed a union card. He told Grant that the Union had sold them out, that Respondent had the name of every person who had signed a card. Bentley asked Grant whether he had signed a card and whether McCutcheon had. Grant, whose sole union activity consisted of signing a card about a week earlier, admitted that he had done so but denied knowledge of whether McCutcheon had signed. Shortly thereafter, Grant was taken to the office where he was told that he was being discharged for having signed a card and engaged in union activity. On the following day, Grant got a message to Bentley's home. When he did so, Bentley asked him to sign a paper stating that he had been coerced or pressured into signing the card. Bentley told Grant that such a statement might not hurt his chances of getting his job back. Grant refused.[13]

Michael Johnson began working at Sumner, as a journeyman ironworker, in December 1975. He was a union member and served on the Union's organizing committee. He distributed authorization cards and witnessed the signing of a number of them. All of the authorization cards in evidence which bear his signature are dated between May 11 and May 19. On May 28, Johnson was promoted to foreman. Johnson credibly denied engaging in any union activity after his promotion and there is no probative evidence to contradict that testimony.[14]

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[13] Grant's testimony stands uncontradicted.

[14] Respondent submitted affidavits to the Board which it contended supported its belief that Johnson had engaged in union activities while a supervisor. All of those affidavits, taken in the course of questioning employees, discussed *supra*, were dated subsequent to Johnson's discharge. Only one, that of Darrell Wright, contains any reference to time. Wright's affidavit, dated June 11, states: "On a Tuesday right after the Safety meeting a couple of

On June 7, Ted Adkins, Johnson's immediate supervisor, took Johnson to the office. On the way, Adkins told him that "all the union men on the job was going to be laid off and all the foremen was going to be fired, Union Foremen." As Johnson recalled, Adkins told him that someone had informed the Company as to who were card signers or union members. In the personnel office, Johnson was told that he was being discharged for union acitvity.[15]

On June 8, Respondent discharged Allen Haga, a general foreman, and his brother, Daniel Haga, a miscellaneous ironworker foreman. Both were told that the Company had evidence that they had coerced an employee into executing an authorization card. Both credibly denied that they had done so and there was no probative evidence to the contrary. However, both had signed authorization cards while occupying supervisory positions.[16]

In late May, Daniel Haga had been called into the personnel office where he met with Frank Walker, Emmerson Johnson and others. At that time, he was told that he was being terminated because he had failed in his obligation as a supervisor to report on the union activities. He convinced them that he was unaware of

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weeks ago, . . . Mike Johnson asked me to sign a card. . . . Two or three days later . . . he asked me if I wanted to sign a card. . . ." Walker did not further pursue the question of the exact date with either Wright or the other employees from whom affidavits were taken. A "couple of weeks" prior to June 11 would place this activity in the week prior to his assumption of supervisory responsibility.

[15] Johnson's tsetimony stands uncontradicted.

[16] Daniel Haga believed that he had signed his card before becoming a supervisor. However, he had become a supervisor within 2 months of being hired on February 23. As all of the card signing took place in May, it was unlikely that he had signed a card while still an employee. His card was not in the record.

those activities and his discharge was rescinded. However, he was questioned about his and Allen's prior union membership and about the union jobs on which they had worked.[17]

E. *Alleged Reduction in Force*

General Counsel alleged that seven employees whom Respondent claimed to have laid off in a reduction in force on June 7 were discriminatorily laid off or discharged. Six of these employees, Curley Peterson, Max Whitson, Clyde Coggins, Marvin Kirk, Roy Collins, and Tommy Johnson made up Michael Johnson's crew. The seventh, Jake Kluttz, was employed as an ironworker at the Fairfield site.

Each of the foregoing employees had signed a union card. All except Collins were union members and general foreman Adkins and other supervisors were aware of the membership of at least four of them. Peterson, Coggins, Kirk, and Tommy Johnson had solicited others to sign cards. Adkins had signed a union card at Tommy Johnson's request in early may. He subsequently expressed regret that he had done so, to Michael Johnson. Several of these employees testified that they had listed unionized employers on their job applications.

On the morning of June 7, prior to the layoff, Adkins came up to where Peterson and Whitson were working. Peterson, who was Adkins' brother-in-law, could see from Adkins' expression that something was wrong. He inquired and was told, "Union problems . . . your whole crew is going to be laid off." [18]

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[17] Daniel Haga's testimony stands essentially uncontradicted. Walker only denied that he told anyone that they were discharged for failing to report union activity. Emmerson Johnson did not testify.

[18] The testimony of Peterson and Whitson stands uncontradicted. Adkins did not testify and Gene Miller's testimony to the

The layoff took place on a Monday. Numerous witnesses on behalf of the General Counsel testified that layoffs at the beginning of the week were unusual in the construction industry. These employees had no prior warning of the layoff; several of them had driven as much as 180 miles from their homes to begin the week's work and would not have done so had they known of the layoff.

Project manager Crowder testified that he had requested authorization to lay off these employees on Wednesday, June 3, but had been told by Ted Johnson, an executive vice president, to hold off because of the union activities. Company records indicate that while the majority of layoffs, involving the largest number of employees, have occurred on Thursdays and Fridays, Respondent did lay off some employees on Mondays, both prior to and since June 7.

At the time of their layoff, Johnson's crew had been working on a wall at the turbine pedestal. The various employees and discharged supervisors testified that there was some work remaining at that specific point after the layoff and more than a year's work for ironworkers throughout the project. Adkins hald told both Kirk and Coggins that they would be assigned elsewhere when the pedestal was completed. Coggins was rehired at Sumner in July; he returned to work upon the same building and the same wall from which he had been laid off. He testified that he observed about the same number of ironworkers employed there as had been there prior to his layoff.

Respondent contended that this reduction in force was economically motivated and necessitated. According to

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effect that he did not tell Adkins to layoff Johnson's crew for union activities is insufficient to rebut the credible testimony of Peterson and Whitson or the adverse inference is properly drawn from Adkins' unexplained testimonial absence.

Crowder, the turbine pedestal upon which these employees had been working was completed and there was no other place to assign them. In part, he said, this was caused by the failure of a subcontractor to complete caisson work required before certain additional construction could begin. Crowder further explained his decision to lay off employees in June, with the aid of charts showing rebar installation, by tons, and the cost of that installation in man hours per ton (mhpt), for the turbine area and for all permanent structures. According to those charts and Crowder's testimony, for all permanent structures, in February there had been 700 tons installed at a cost of 35 mpht. It dropped to 500 and 600 tons, at 45 and 55 mpht respectively in March and April. In April, 25 rebar ironworkers were laid off. May's production was 510 tons at a cost of 50 mhpt. In June, however, overall rebar installation dropped to 300 tons, and the cost rose to approximately 116 mpht. In July, production rose minimally to 315 tons; costs dropped slightly to 110 mhpt. For the turbine area, where the affected employees worked, April and May were "highly productive," with approximately 200 tons installed in each month at a cost of 57-60 mhpt. In June, following the lay off of 7 reinforcing ironworkers out of a complement (as of May 31) of 246, production dropped to 75 tons and costs rose to 110. Production dropped even further, to 38 tons, in July, and costs rose again to 142 mhpt. Crowder testified that the July figure indicated that the June lay off had not been large enough; however, no additional ironworkers were laid off in July. In fact, while the rebar complement decreased from 246 to 180 (including acquisitions and separations for all reasons) during June, it increased in July back up to 245. Eighty rebar ironworkers were hired in July. The rebar ironworker complement remained essentially constant in August and September. Production increased, and costs decreased, in both of those months. Crowder

acknowledged that there was a normal correlation between low production and high costs. Notwithstanding the fluctuations described above, Respondent's production charts reveal that over the life of the project, man hours per ton have remained essentially constant, and vary little between the "turbine area" and "all permanent structures." To the extent that they differed at all, the average for the turbine area was slightly lower.

Crowder testified that Respondent seldom considered seniority in selections for layoff. Its criteria were productivity, qualifications, and attendance. When a layoff is called for, he said, they would cull out the least desirable employees. As previously noted, the instant layoff involved all of the members of a single crew. Crowder claimed that these were the employees in the least productive area.

About a week after his layoff, Collins called Daniel's personnel department in Greenville. He spoke with a Jerry Raines, whom he usually called when he was looking for work. Raines told him that they were not hiring at Jenkinsville, that Collins "would have to wait until they got it kind of straightened out down there again," and then Collins could go back to work. As noted, Collins was called back in July. When he reported to the gate and filled out an application, he was told that he would have to wait until the next day because "they wanted to check [him] out." He started working the next day.

Marvin Kirk applied for work at Jenkinsville on June 22. He filled out an application and was told that they would not be hiring for 3 to 4 weeks. He reapplied on July 22, by telephone. He was told that he would be called the following day and told whether he would be hired. Kirk called Frank Walker on July 23. Walker said that they would have to check his record. He told Walker that he had been told the prior day that they

would let him know if they could hire him. There was a short pause and Walker told him that there was no way that they could put him back to work. Walker had no recollection of Kirk or any conversation with him. I credit Kirk's recollection. In October, Kirk received a telefax request from Respondent to call Greenville collect in regard to employment. He called on October 13 and while he was explaining who was calling, the recipient hung up. Respondent explained that it was its practice, when seeking employees, to send out such telegrams. After the required positions are filled, all further collect calls are rejected.

Max Whitson received a similar telefax about October 12. He called in on October 14 and was referred to Jesse Simmons. Simmons asked whether Whitson was a miscellaneous ironworker. Whitson told him that he had worked miscellaneous but preferred rods. Simmons told Whitson that they needed 25 rodbusters at Sumner. When Whitson told Simmons that he had worked at Sumner, Simmons asked why he left. Whitson said that he had been told it was for union activities. Simmons stated, "I don't know whether they will hire you back or not." He promised to call Whitson back but never did.

Curley Peterson also received a telefax inquiry. Rather than calling, he went to the site. After attempting to apply twice, and being told that they were not hiring, he spoke with Gary Pace. Pace initially told him that he was not eligible for rehire. Peterson showed Pace that he had left in a reduction in force. Pace told him to return the following day. When he did so, Pace told him that they would hire him back but made him promise to tell Pace if he saw any union cards being passed. Pace said that there was not going to be a union there.[19]

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[19] Peterson's credible testimony stands uncontradicted.

Daniel's "Labor Turnover Report," for the month ending October 31, shows 104 reinforcing ironworkers hired during that month. From the beginning of that month through its conclusion, the complement within that classification rose from 247 to 329.

Jake Klutzz was the only employee named in the complaint who had worked at the Fairfield Pump Station rather than at Sumner. He had been hired in, at the suggestion of Fowler, on May 31, as a rodbuster. He was a union member and his application showed some unionized employers among his references. He had signed a union authorization card and talked about the Union with some of the men with whom he was working. He worked until June 10 and, when he came to work on that date, found his timecard had been pulled. He was told to report to the office. He did so, and observed the same man, James Long, to whom he had made his application. While there, he testified his foreman, Bill Dorn, came in, asked why Kluttz was late and went in to the office at the back of the trailer. Kluttz heard his foreman and the others in the office arguing over his layoff, the foreman protesting against it. Kluttz then heard one of the men say, "Jesus Christ, this man is the ringleader of 413, get him the hell out of here. Bill called somewhere and found this out." Within a few minutes, Kluttz said, someone came out with his check and he left.[20]

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[20] James Long, personnel administrator at Fairfield (Frank Walker's counterpart), testified (but produced no documentary support thereof) that Kluttz was just one of 61 employees laid off on June 10 (a Thursday and pay day at Fairfield). Of those, he said eight were ironworkers. Kluttz was the only ironworker laid off from the night shift. Kluttz was the least senior employee and seniority, he claimed, was followed for layoffs at Fairfield. Long denied any knowledge of Kluttz's union activities. He further denied that Kluttz would have any reason to come to his office on the night of his layoff and denied that anyone in his presence made a statement such as was related by Kluttz. Based upon my observation of the witnesses, noting Kluttz' accurate description of

Shortly after the June layoff, according to William Dickey, Richard Dickey, and William Lominac, they attended a safety meeting conducted by Jesse Sellers, ironworker superintendent. In the course of this meeting, Sellers was heard to say that there were a lot less men at this meeting than there had been at the prior meeting and that there would probably be less at the next. When asked why, Sellers said "Oh, you know. All this damn union shit." [21]

F. *Testimony of Tice Randolph*

Tice Randolph had worked for Daniel for about 3 years, at various locations. Between July 1975 and September 1976, he was the ironworker and civil superintendent for a Daniel project in Batesville, Arkansas. About mid-June, Randolph was called into the office of project manager Bill Rankin. Rankin handed him a typewritten list with about 35 to 40 names and told Randolph:

Long's office and its personnel, and further noting the inclusion of Kluttz' name on a list of union activists discharged from the Jenkinsville site, as described by Tice Randolph, *infra*, I credit Kluttz.

[21] Sellers admitted that he made a similar statement, but related it to Respondent's alleged stepped-up enforcement of its safety rules rather than to the union activity. A comparison of Sellers' testimony concerning when he made the statement and what caused him to make it with the evidence of when the safety program was developed and announced and with the record of discharges allegedly pursuant to that policy (discussed infra), establishes that Sellers' version is improbable, if not impossible. Additionally, Lominac, who credibly testified in regard to Seller's statement, was one of those allegedly discharged under that safety policy. If, as Sellers claimed, he made his statement after a number of employees had been discharged for safety violations, Lominac would not likely have been there to hear him. For these reasons, and considering the comparative demeanors of the witnesses, I credit the Dickeys and Lominac, rather than Sellers.

> [W]hat we are talking about here, I don't want it to go any further than this [door] . . . [Y]ou notice this list here . . . this is a list of the men they have run off the Jenkinsville job for union organizational attempts, and for some reason or another, the Greenville office thinks that they might be coming this way and try to organize us here . . . I want you to memorize as many of these names as you possibly can . . . and if any of these men show up at the gate, I want to know about it. . . . [W]e will let them go ahead and put in an application and then I want to know about it when they are here.

It was made clear that he was to hire none of the people named on the list. Randolph looked at the list and recognized some of the names. He recalled the names of Roy Collins, Max Whitson, Marvin Kirk, Clyde Coggins, Jake Kluttz, Ralph Tucker, T.D. Buckner, "a couple of Petersons" including one named "Curley" whom he pointed out to Rankin as being Teddy Adkins' brother-in-law,[22] Mike Johnson, Tommy Steen, Don McCarver, Tommy Johnson, Gerald Kerr, William Lominac, Marvin Smith and Steven Brandon.

Subsequent to his conversation with Randolph, and after he left the Batesville job, Randolph spoke separately with both Malcolm Rainwater, personnel director at a Daniels' job in Oklahoma, and Emmerson Johnson, Daniels' employee relations manager. He told them both that he had been approached by Bobby Fowler to testify about the list. Rainwater said that if he did, it would ruin them. He asked Johnson to place him on a job where Fowler

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[22] All of these, Randolph was able to recall of his own, unrefreshed, memory. The remaining names he recalled only after having his memory refreshed by examination of the names listed in the complaint.

might not pursue him for his testimony. Johnson told him not to worry, as they were looking for a place to put him to work and would have him on a job in a couple of weeks. However, he never heard from Johnson after that.[23]

G. *Testimony of Curtis G. Whisennant*

Curtis Whisennant had worked for Daniels, on and off and in a variety of supervisory positions, for about 9 years. From June to November 1976, he was employed in the welding department and, after the middle of June, was a general foreman acting in the capacity of welding superintendent. Approximately 80 percent of the welders working under Whisennant were ironworkers.

When Whisennant was first placed in his supervisory position, as assistant to then superintendent Bob Alley, Emmerson Johnson called him aside and told him:

> Curt, they are trying to do the same thing that they did back in '62 to us. . . they are trying to organize the job, I want you to keep a lookout; if you hear anything, or there is anything, or anything is said regarding union activity, I want you to get in touch with me. . . .[24]

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[23] Neither Rankin nor Rainwater were called to refute this testimony and no explanation for their absence was offered. Johnson testified but did not deny the conversion with Randolph. He only denied that he had given the names of the pro-union people at Jenkinsville to anyone at Batesville. An inference, adverse to Respondent, is warranted from the failure to adduce any evidence controverting Randolph's testimony. Moreover, I observed no infirmities in Randolph's demeanor such as might impair his credibility. Therefore, although Randolph harbored some resentment against Daniels based upon his subsequent employment history, I find his uncontradicted testimony to be credible.

[24] Although Johnson testified on behalf of Respondent, this testimony is uncontradicted.

Among Whisennant's early assignments, in July, was the screening of welder applications. After he had screened some, Bill Burns (identified by Whisennant as the personnel representative working outside the gate) showed Whisennant some of the applications he had approved, pointed out some of the prior jobs listed on the applications, and asked Whisennant, "Did you see this . . . did you know this was a union job?" When Whisennant replied affirmatively, he was told that they could not use the man. Thereafter, when Whisennant saw that an applicant had union affiliations, he would make an excuse for not hiring him. He also instructed his assistant, Mr. English, to do the same thing.

Whisennant testified that he had been told by Gary Pace that any questions about whether an employee was desirable could be checked out by calling Greenville, Daniels' headquarters, where files were maintained on all former employees. According to Whisennant, Pace referred to organized labor, union, or union influences in telling him this. As previously noted, Pace did not testify. Other witnesses for Respondent established that Daniels does maintain computer records of former employees, for the purposes of filling job openings. Those records list the employee's history, including discharges, which are coded according to type. There does not appear to be any code or computer symbol which would indicate if a former employee had a union affiliation or had been fired for union activity. Whisennant never utilized the alleged system to determine whether an applicant was a union activist.

Whisennant further testified that one of his superiors, a Mr. King, gave him instructions in regard to eliminating persons who were undesirable either because of their union activity or for other reasons. He was told that there had to be a legal reason, such as a voluntary quit, reduction of force, falsification of an application, or a safety

violation. These he understood to be pretexts. King told him that the NLRB would accept two disciplinary forms in an employee's record as reasonable grounds for dismissal.[25]

H. *Alleged Safety Violation Discharges*

General Counsel alleged that the discharges of seven employees for alleged safety violations were pretexual, that these employees were actually discharged for their union activity. Respondent controverted this allegation.

Gerald Lee Kerr started at Sumner in mid-April, as a rodbuster on the day shift. He was a union member, served on the Union's organizing committee, signed an authorization card, and solicited a number of other employees to sign cards. His union membership was known to foremen Johnny Earls and Don McCarver (both discharged for union activity) and Ted Adkins, general foreman.

In about later May, Kerr and a fellow employee known to Kerr only as Ralph were approached by Bill Hackard, the general foreman. Hackard told him that they still had their jobs if they wanted them, but they would have to work on the third shift. They were the only two on the eight man crew transferred to the night shift.[26]

On June 11, Respondent took an affidavit from employee James Davis. In that affidavit, Davis reported that Kerr had solicited him to sign an authorization card. On that same day, in the early evening, Roy Neeley, their foreman, discharged Kerr for wearing his hardhat backwards

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[25] Whisennant's testimony in this regard is uncontradicted and is credited. However, his further testimony to the effect that he personally was involved in the discriminatory discharges of five or six employees was too general to be accorded any probative weight.

[26] General Counsel amended the complaint to allege this transfer as a further violation of Section 8(a)(1).

and Ralph for failing to wear safety glasses.[27] Kerr did not deny wearing his hardhat backwards. It was, according to Kerr and other credible General Counsel witnesses, a common practice among ironworkers. Their testimony was corroborated by at least two of Respondent's witnesses. Because of the bill of such hats, reversal was necessary when wearing a welding shield; it was also more convenient when using burning goggles. At the time Kerr was discharged, he had been burning and was using goggles. He testified that he had worn his helmet thusly every night that week, including when a safety inspector had come around to check on his safety glasses, and nothing had been said to him. He had no prior warnings for safety violations. Kerr also testified that at the time he was discharged, other employees in that immediate area were similarly wearing their hardhats reversed.[28] Clyde Coggins testified, without contradiction that he had worn his hardhat backwards in the presence of supervisors Gene Miller and Ted Adkins, without being directed to change it.

Respondent's safety rules require that a hardhat be worn at all times; the Construction Safety Handbook which is given to each employee so states. That Handbook contains no proscription against wearing a hardhat in a reversed position. Respondent's new employees also receive an orientation, which includes a slide presentation. In that slide presentation, they are told, "The only

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[27] No unfair labor practice charge involving Ralph ——— has been filed.

[28] Neeley claimed that he had warned Kerr twice before about wearing his hard hat backwards. He also denied observing other employees wearing hats in that manner. I was unfavorably impressed with Neeley's testimonial demeanor. Neeley denied knowledge of the union activity until mid-July. In view of the meetings Respondent held with all supervision, and the fact that the union activity was common knowledge in June, Neeley's testimony is, at best, implausible. Accordingly, I credit Kerr.

employees allowed to wear their hardhats backwards are welders and connectors." In the slides, however, are shown a number of employees wearing their hardhats in the reversed position. Not all the employees so shown are wearing welding shields or burning goggles.

Paul Vincent was also a rodbuster on Roy Neeley's crew. He signed a union authorization card while on the job and, during a supper period around the beginning of June, in Neeley's presence, gave another employee a card. On June 15, according to Vincent, he was assigned to flag a crane and climbed to a vantage point from which the crane could be seen. It was a foggy night, and he removed his safety glasses momentarily to see the crane better, cleaned then and put them back on. Neeley called him down and Vincent was discharged for not wearing his safety glasses. Vincent had no prior warnings for safety violations.

Vincent claimed that he had been told, in the course of the orientation, that employees would be discharged after the third safety violation. However, he was unable to identify the individual who made that statement. Neither the transcript of the safety portion of the orientation nor the safety handbook contain any such limitation. It is clear that at the time of Vincent's discharge, there was a rule requiring safety glasses at all times on the site. However, according to foreman Paul Pringle, prior to at least July 1, it was not common to see an employee not wearing his safety glasses. Respondent's orientation slides show a number of employees without their glasses.[29]

In November, Vincent returned to the jobsite, completed an application, had that application signed by a super-

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[29] Neeley asserted that he had warned Vincent twice for failure to wear his safety glasses. I was more favorably impressed with Vincent's demeanor as a witness than with that of Neeley, and credit Vincent.

intendent, was sent for a physical examination, received an employee's badge, and then was told to get his license number for entry on a card that would permit him to enter the premises each night. When he returned to the office with his license number, having completed the hiring process, he was told that Daniel could not use him because of his prior discharge had been for a safety violation.[30]

William M. Lominac was an ironworker hired on May 18 and discharged on July 2. He was a member of the Union and has passed out authorization cards at the jobsite during his employment. Both his membership and his organizational activities were known to his supervisors. He had been questioned by Frank Walker concerning the organizational activities of supervisors.

On July 2, Lominac's foreman, Futrell, assigned him to make some welds on columns which were 12 to 14 feet above the ground level. He did so. After he had completed the work and returned to the ground, he observed Futrell and general foreman Barfield in conversation. Futrell told Lominac that he was discharged for not wearing his safety glasses while working up on the iron. In fact, Lominac had been wearing a welding shield, a fiberglass mask covering the entire face with an opening containing four layers of glass for vision. He had not worn his safety glass under the shield because to do so would have further restricted his vision. He had put his safety glasses back on as soon as he took off the shield.

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[30] Vincent testified that James R. Bailey, a welding instructor, told him that they had denied him rehire because he had signed a union card. Vincent's testimony was corroborated by that of his wife; it was denied by Bailey. The evidence reflects that Bailey had worked for Daniels as a welding instructor, but at the time of this conversation, was employed by the county to teach welding at the site. There was no evidence to establish that Bailey was a supervisor or agent in Daniel's behalf, or that he was held out by Daniel as having the authority to speak for it. Resolution of this credibility conflict is thus unnecessary.

He was taken to the office where his termination records and appraisal were completed. Both forms, signed by Barfield, indicate that he was discharged for *a* safety violation (singular), and the appraisal specifies "safety glasses." [31] Lominac had received no prior warning for safety violations.

Steven Brandon was hired as an ironworker on May 18. He was a union member, had signed an authorization card and solicited other employees to sign. His union affiliation was known to his foremen, Fred Wicker and Carl Futrell, his general foreman, Danny Barfield, and to Frank Walker, who had questioned him about supervisory particiaption in the organizing activities in the week before his discharge. In that interview, Brandon had affirmed that he was aware of the union activity and volunteered that he was a member of the organizing committee.

Brandon was discharged on July 6, allegedly for failure to wear his safety glasses. Brandon testified that he was standing outside the fabrication shop prior to the start of work when Futrell told him to put his safety glasses on. He said that he would when the whistle blew. Barfield, the general foreman, came out of the shop and asked to speak to Brandon. He asked Brandon to quit and, when Brandon refused, said that he had to fire him. At Barfield's suggestion, Brandon provided a pretext for Barfield to fire him, sitting down and refusing to work. However, after he checked in his tools, Barfield said that he couldn't fire him for that, but would have to fire him

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[31] Barfield testified that superintendent Grava had directed Lominac's discharge because he had observed him working high above the ground without either safety belt or safety glasses. Of these, he said, the safety belt would have been the more serious violation. Noting that the termination papers refer only to a singular safety violation, safety glasses, and noting further that neither Gravat nor Futrell testified, and considering the comparative demeanors, I credit Lominac.

for a safety violation because he might have to work for Daniel again. (Daniel, it was testified, maintains a rule against rehiring employees discharged for safety violations.) Barfield testified that he made the decision to discharge Brandon on his own and solely because of his violation of the safety glasses requirement. He denied asking Brandon to quit voluntarily or going through charade to create a basis for discharge. Brandon's testimony was, in part, corroborated by that of William Dickey, a foreman (alleged in the complaint to have been discharged in violation of Section 8(a)(1)), who was told by Barfield that he did not want to fire Brandon and had asked him to quit. Additionally, Fred Wicker, a foreman earlier discharged for union activity, who had been reinstated on the day of Brandon's discharge, testified that upon his return Barfield told him to discharge Brandon because Brandon was a union organizer. Wicker refused. I credit Brandon's testimony as thus corroborated.

On July 7, ironworkers *Starks A. Porter*, *Kermit Roy*, and *Wilbur Keith Queen* were all terminated for alleged failure to wear or use safety belts. All three had signed authorization cards and were, or had been, members of the Union. Various members of supervision were aware of their union backgrounds. Unionized employers were included among their references. All three of these employees had been questioned about supervisory participation in the organizing campaign. In addition, just after Michael Grant had been discharged on June 7, Porter was asked by Dean Bentley, a general foremen, whether anyone had pressured him into signing a card.

On the day of his discharge, Porter was working above ground level when his foreman, Billy Hicks, called him down. Hicks told him that he had been observed by Terry Bishop, assistant superintendent, working without having fastened his safety belt. Hicks told him that Bishop had ordered the discharge, and said that Hicks would be discharged if he did not carry out the order.

As they walked to the toolroom, Hicks told Porter that safety was not the real reason for his discharge, that they both knew that the real reason was Porter's prior union affiliation. Porter candidly admitted that at the time he was called off the iron, he had not fastened his safety belt and had only worn it about half of the time on the day. He observed that there were other ironworkers not tied off at the moment when he was called off the iron. His testimony is uncontradicted.

Bishop recalled directing the discharge of an employee whom he had observed to be working without a tied-off safety belt. He could not identify the employee as Porter. Bishop only recalled one other instance of his causing a discharge for that reason, a case wherein the employee had fallen. Bishop admitted that he had observed workers up on the iron without using a safety belt and, when asked whether he had ever directed their termination just because they were not using the safety belt, he replied, "Well, I would have to say that if I seen a man doing it several times, more than likely, yes." Bishop did not claim that he observed Porter working without a fastened safety belt on more than one occasion.

Kermit Roy was working as a rigger on Paul Pringle's crew. On July 7, he testified, following the weekly safety meeting, Pringle asked him if he wouldn't just quit. When Roy asked why he should, Pringle gave no reply. Roy, being the oldest man in his crew, normally worked on the ground. On this morning, however, Pringle assigned him to climb up on the iron to flag a crane. Roy did so. He climbed up, wearing his safety belt, stopped, observed that he needed a better vantage point and began to climb higher. As he was climbing, Pringle called him down and discharged him for failure to have his safety belt fastened.[32]

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[32] Pringle testified that he specifically instructed Roy to wear his belt when he told him to climb the iron, subsequently noticed that

On the morning of his discharge, Keith Queen had been working in a crew on a wall, installing "imbed plates." Queen was inside the wall, an area from which he could hardly fall, and had not fastened his safety belt. He observed his foreman, Bobby Harris, talking to Dean Bentley. Harris then came over and called Queen down. He told Queen that he hated to do it, but he had to let Queen go. Queen asked for a reason and was told that he had committed a safety violation, failure to tie off his safety belt. He protested that he was not being given the real reason and Harris told him, "Well, you know and I know but I can't do nothing about it. The reason that I am telling you that I am firing you is for safety violations." Queen continued to protest that the real reason was his former union membership and Harris repeated that Queen knew the reason but the reason he was giving Queen was the safety violation.

A couple of days later, Harris dropped by Queen's home. Queen was not home, but his wife, Connie, was. Harris asked if there were any hard feelings over his discharge of Queen. Mrs. Queen said that there were

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Roy was working on the iron without a belt, again advised him to put a safety belt on, and then discharged him some time later when he again saw that Roy had not put on a belt. He claimed that Roy was on the iron for about 2 hours, and never tied off, before being discharged. I cannot credit Pringle's testimony. In addition to my consideration of the demeanor of these witnesses, I deem it implausible that Roy would have repeatedly disregarded such explicit instructions to wear and use a safety belt, particularly at a time when other union-affiliated employees were being discharged, or that Pringle would have directed him to put on a belt a second time and not remain to observe whether he was complying. Moreover, I note that Pringle denied any knowledge of the union activity until 2 to 3 weeks *after* Roy was discharged. This disclaimer, in the face of evidence that the union activity was common knowledge much earlier and had been the subject of meetings for supervisors during June, reflects adversely on the credibility of Pringle.

not, that they knew that he only did what he had to do. Harris told her that Dean Bentley had directed him to discharge Queen because of Queen's prior union affiliation. He told her that he was trying to get Queen's job back but it was "still hot down there" because of the Union.[33]

None of the three last described employees had received any prior warnings or citations for safety violations. All three attended a safety meeting on the morning of their discharge in which Jesse Sellers told them, as he had done on prior occasions, that they would be discharged upon receipt of a third reprimand for violation of safety rules. Both Porter and Queen recalled Sellers as stating that enforcement of the safety rules was being tightened.

According to Respondent's safety engineer, Bobby Phillips, a step-up of the safety program was undertaken in early July because of an increase in the number of accidents on the site from January to that time and an accident on July 1, which resulted in an employee's death on July 13. In March, there had been 288 injuries in a work force of 1500; in April May and June, with approximately 1900 employees, there were 463, 479, and 504 injuries respectively. A policy was prepared and issued to all superintendents and department heads by Gravat, the construction manager, on July 7.[34] It stated:

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[33] Both Keith and Connie Queen impressed me as credible witnesses. I was less favorably impressed by Harris' denials of the foregoing testimony. I found particularly improbable Harris' testimony that he stood and observed Queen working in violation of the safety belt requirement for 3 to 5 minutes, with his own supervisor present, and did not take some quicker action to correct the violation and protect both the employee and his own job security.

[34] Respondent contended that this policy was made known to the foremen a week or more prior to its publication date. In view of

> Effective this date, all safety rules will be strictly enforced on this project for all personnel and citations will be given to anyone disobeying any rule. If an employee receives two (2) Safety Citations for any reason, he will be terminated and his Foreman will regress to Journeyman. If two (2) foreman are regressed to Journeyman, the General Foreman will automatically regress to Foreman.

According to Phillips, nothing in this policy precluded a foreman from discharging an employee on his first violation. However, prior to this policy announcement, safety had been enforced only by the safety department; the foremen had not been enforcing safety regulations. Sellers acknowledged that prior to the promulgation of Gravat's directive, everyone was lax on safety. Employees were not wearing safety glasses, they wore their hardhats backwards, and as many as a quarter of them were not using their safety belts. Foreman Paul Pringle corroborated this aspect of Sellers' testimony.

Phillips further testified that there were some safety violations, those which were deliberate or flagrant, or which jeopardized the employee or others maliciously, which would warrant immediate discharge. Working without a safety helmet might be such a violation, but working without safety glasses or with a hardhat reversed would not. He stated that in his own observation, rigging crew connectors usually worked with their helmets reversed because they were required to frequently look up and the bill of the helmet obstructed their vision. Welders and others who wore face shields also wore hardhats backwards.

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the timing of the accident reports and the ultimately fatal accident which gave rise to this stricter policy, I find it unlikely that the policy could have been announced more than a couple of days prior to July 7.

I. *Other Discharges*

James Walker was an ironworker leadman (nonsupervisory) who had begun work at Sumner in September 1975. He signed an authorization card around April or May, he testified, and asked others to do so. Among those he asked was his foreman, Jack Hiatt.

Walker's last day of employment was May 20. On that day, he told his supervisors that he had to leave, for medical reasons, for 2 to 6 weeks. He claimed that Ted Adkins told him that they would hold his job open. He further claimed that he was given a white slip stating that he was eligible to return to work upon his release from the hospital.[35] Personnel manager Frank Walker and foreman Bill Bollick testified that Respondent did not give employees forms indicating that they were eligible for rehire and that Respondent did not hold or guarantee jobs for employees terminated because of medical problems. Bollick denied that Walker was guaranteed a job upon his return. James Walker admitted that on his last day of employment he was told, by his supervisors, Bollick, Long and Adkins, that he was being terminated for excessive absenteeism. He admitted to some absenteeism, but denied that it was excessive.

James Walker returned to the Sumner site on Monday, June 7. He was refused admittance at the gate and was told that Respondent was not hiring rod busters. After trying, unsuccessfully, to contact Adkins, he was referred to an unidentified male in the personnel office. That person told him that, on orders from Greenville, "they were not putting rod busters on because of the union conflictions." Walker further claimed that when

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[35] Walker did not produce this form although he claimed to have a copy of it. He denied that the form he had received was his termination appraisal, which had stated that he was eligible for rehire.

he returned on the following Monday, the personnel representative came to the door and announced to those job applicants present that they were not hiring rod busters because of union problems. However, Walker was offered a laborer's job, at about one-half of the pay rate that he had received as a rod buster. Other, higher paying, jobs for which he was not qualified, were also being filled.

Darrell Rice was employed at the Sumner site for January until May 28, as a rigger. He was a member of Local 601, a sister local to Local 413. He signed a union authorization card and solicited a number of other employees to do likewise. The record contains four cards witnessed by Rice, three dated in mid-May and a fourth which is undated. His union activity was observed by at least one supervisor, and his union affiliation was known to others.

About a month prior to his May 28 discharge, Rice testified, rod buster foreman Woodrow Ellisore asked him if he was having anything to do with the soliciting of applicants for the Union. When Rice feigned ignorance, Ellisore allegedly said that he knew that if there were any union activity going on, that Rice would know about it and cautioned Rice that if he saw Rice soliciting for the Union or engaging in any other union activity, Rice would be terminated. Ellisore, who had been a member of Rice's local, admitted threatening to discharge Rice, but for engaging in commercial activities, selling candy and soft drinks, when he was supposed to be working. Ellisore claimed that Rice's activities were hindering production, because he would not be present when needed to assist in the operation of the crane. On balance, I find that Ellisore presented the more credible demeanor and I do not credit Rice's testimony as to this alleged threat and interrogation. In so concluding, I note that at the time of this alleged conversation as described by

Rice, the union activity had not begun in earnest. I note also that Rice was not recalled to rebut or deny Ellisore's testimony.

About a week or so after Rice's alleged conversation with Ellisore, described above, he was allegedly spoken to by David Pruitt, general foreman of the night shift. Rice testified that Ellisore was present. Pruitt asked him if he had ever worked on a union job. Rice played dumb. Pruitt did not testify; however, Ellisore credibly denied being present at any conversation between Pruitt and employees.

About a week before his termination, Rice spoke with Gene Cassidy, miscellaneous ironworker foreman. Cassidy asked him if he was still a member of the Charleston local (Local 601) and Rice told Cassidy that he was. Cassidy told Rice that it made no difference, that he was glad to have Rice working there. Although Cassidy testified, he did not deny this conversation.

On May 21, Rice left work early, with permission, because of a death in the family. At the end of that week, he took a 1 week vacation, which he had planned for some time. He claimed that he had told Cassidy of his plans several months earlier and had been told not to worry about it so long as he let Cassidy know when he was going. Rice testified that he told Cassidy that he was taking a week off, but asked Cassidy to cover for him by saying that he had to leave town because of the death in his family. Cassidy allegedly agreed and indicated that he would take care of it. When, however, Rice returned on June 7, he was told that he had been discharged for excessive absenteeism, failure to call in each day during his absence. Rice continued to maintain the subterfuge of an absence necessitated by a death in the family. Rice further testified that after his discharge he spoke with Cassidy who told him that on both the first and second nights of his absence (June 1 and 2), assistant superintendent Hooks had come looking

for Rice and had discharged approximately 15 other men each night. Cassidy denied telling Rice that he would cover for him but admitted that he told Rice that unless Rice's absence was noticed, he would not report him. According to Cassidy, the superintendent checked the timecards each night and noticed Rice's absence on the second night. He asked Cassidy whether Rice had called in. Cassidy was subsequently informed that Rice was discharged for excessive absenteeism. Cassidy impressed me as a candid witness who attempted to accurately recall events as they occurred. As noted, I was less favorably impressed by Rice. Accordingly, I credit the testimony of Cassidy.

Rice made several unsuccessful attempts to be rehired at Sumner. On one occasion, about 3 weeks after his discharge, he spoke with a longtime Daniel employee, L. C. Chandler, who said that he would try to get Rice back on the job. With Rice on an extension phone, Chandler called Roger Benton, ironworker superintendent. In response to Chandler's question, Benton said that he needed as many good riggers as Chandler could send him. He described Rice's experience, which Benton said sounded good. He then told Benton Rice's name and mentioned that he worked on the site before. Benton replied that they could not use Rice; he gave no reason. Neither Benton nor Chandler testified.

Marvin Smith was employed as a journeyman ironworker at Sumner from May until his discharge on July 2. He was a longstanding member of Local 413 and the only union member in foreman Rick Byce's crew. His application listed unionized employers in his employment history. About mid-June, Byce called his crew together. According to Smith's uncontradicted testimony, Byce told him that they had gotten word that cards were being passed out, that possibly it was getting out of hand, that he could not tell them whether or not to sign a card, "but

. . . if it does go union . . . the ones that don't belong to the union are going to be out of a job.

On July 2, Smith was working on the construction of columns, "plumbing the cables with the piano wire, getting it lined up for the welders." This work required that the employees sit up on the elevated steel. Part of their time is consumed in waiting for the welders to arrive to complete the work. Terry Bishop drove up, talked to Byce and then called Smith over. Bishop told Smith that he had to "carry" him to the office. As he and Byce accompanied Bishop to the office, Byce asked whether Smith was being fired, was told that Smith was, and questioned whether he shouldn't have had something to say about it as Smith's foreman. Bishop indicated that he was merely following orders, that Gene Miller, rebar superintendent, had told him to bring Smith to the office to be discharged for "failure to do assigned duties." Byce protested that Smith was doing what he had been assigned to do, as were the other employees. At the office, Smith's termination slip was already made out with the reason for his discharge, as stated by Bishop.

Smith and Byce then spoke with Gene Miller. Miller told them that he had driven by 3 times and observed Smith sitting down. Byce protested that Smith had to be seated to perform the work that had been assigned to him and that three other welders were also there and were seated. Byce's protestations were unavailing. Later that afternoon, as Smith and Byce talked while Smith was waiting for his carpool to leave, Byce told him, "You got a pretty good idea why you got fired, didn't you?" Smith said that he did and Byce told Smith that he had nothing to do with it.

Byce did not testify. Bishop, although called as Respondent's witness, did not refer to Smith's discharge. Miller testified that he observed Smith 3 times in the span of about 1 hour. Each time, Smith was sitting

down. On the first occasion, he said, Smith could not have been straightening the wire because he was facing in the wrong direction. On the second and third occasions, Smith could have been straightening the wire; he admitted that an employee would probably be seated in such a position to be performing that work. Miller claimed that he reported Smith to Gravat after his second observation and that Gravat told Bishop to discharge Smith. At hearing, Miller was asked:

> Q. (By Administrative Law Judge); If [Smith] was in the normal position for someone to be straightening wire, and that was the work that was being done on the iron at the time, and he could have been doing that at that time, why did you report him?

He answered:

> A. I mean because he was just sitting there as far as I was concerned.
>
> Q. But you said that he could have been working on the wire?
>
> A. That is possible.

William Dickey and his son, *Richard Dickey* were both employed at the Sumner site and worked together. William Dickey, a supervisor, was a member of the Union, a fact known to Bill Long, ironworker superintendent. He signed an authorization card and solicited others to sign while employed there. Richard had also signed a card.

In early June, Richard Dickey took 3 days off with permission from Barfield. However, when he returned, he was given a warning for absenteeism. Thereafter, according to Richard's testimony, he was absent between 1 and 3 more times. On July 8, their foreman, Carl Futrell, told them that Richard was being discharged

for absenteeism. William asked to see Barfield and, although Futrell told him it would do no good, they went and spoke with Barfield. William Dickey recalled that Barfield admitted that he had let Richard have 3 days off and that there were employees with worse records than Richard. However, he insisted that they had to let Richard go. William told Barfield that his son was being punished because of him, a statement that "was . . . agreed with." According to Richard, they were told that the orders for his discharge had come from Greenville, and no one on the job could prevent it.

William Dickey threatened to quit because of his son's discharge and left the site with Richard, undecided over what to do. He did not report for work the next day, but called in. That night, he testified, he was called by Barfield who asked him what he intended to do. He told Barfield that he was returning to work. William Dickey testified that Barfield told him that he had orders from Jesse Sellers to fire him for whatever reason came up and that they had fired his son in the expectation that William would quit when Richard was fired. William Dickey did not go to work the next day, and that night received another call from Barfield. Barfield told William that they weren't going to fire him unless they got further orders, that the Labor Board had ruled and there was not going to be any election. William returned to work the following day. Sometime after he returned, he spoke to Barfield and Sellers about having Richard hired back. Sellers, he said, told him that they believed they could do so, "whenever they got through checking out this union stuff." William told them that Richard had never belonged to a union, but that he was 100 percent union. He told them that they got the wrong man.

Richard Dickey testified that he called Barfield on 2 or 3 occasions after his discharge, seeking reinstatement. In late July, Barfield told him to "Give me a couple of

weeks because of all this union mess going on, let it clear up a little bit, and he felt sure that I could come back to work."

On August 1, Richard Dickey was rehired, as a welder, by Curtis Whisennant. At that time, he told Whisennant that he had to work days because he was attending a welding school at night. Whisennant assured him of a day shift job. On the following day, having heard a rumor of a possible transfer to the second shift, he again spoke to Whisennant. He told Whisennant that if he were transferred, his schooling and transportation problems would force him to quit. About the third day of his employment, Whisennant told him that he had to be transferred to the second shift. Richard then sought a transfer to a rigging crew on the day shift. His transfer was approved by the rigging foreman, Swindler, the general foreman, Swanger, and by Terry Bishop, ironworker assistant superintendent. He was put to work as a rigger. After he started to work, Whisennant came and told him that he could not be transferred. They went to see Bishop, who asked why Richard could not be transferred. Whisennant said that they had orders from the welding superintendent to put him on the second shift. Bishop and Richard went to see Bob Alley welding superintendent, and Bishop repeated his question to Alley. Alley stated that they had orders to fire Richard and not to transfer him. Bishop then went to speak with construction manager Gravat. When he returned he told Richard that there was nothing he could do, that the orders to fire him had come from higher authority, in Greenville. Rather than take a discharge, Richard quit. On August 14, William Dickey also quit, because of the treatment accorded his son and because he feared that he, too, would be discharged.

Sellers and Barfield denied the statements attributed to them by William and Richard Dickey and denied en-

gaging in essentially all of the conversations. No evidence of Richard's absenteeism, other than Barfield's testimony, was introduced. Whisennant, moreover, corroborated Dickeys' testimony concerning Richard's second termination and testified to orders he had received to get rid of a young man named Dickey whose union activity had been overlooked in hiring. The employee, he testified, was eliminated by assigning him to a shift upon which he could not work. Bishop did not testify in regard to the Dickeys. Alley, Swanger, Swindler, and Gravat did not testify at all. Considering all of the foregoing, and their comparative demeanors, I credit the testimony of William and Richard Dickey and Curtis Whisennant.

Olin White was neither a union member nor an authorization card signer. He worked at Sumner, as a miscellaneous ironworker, from the first of May until July 8. He had been in Fred Wicker's crew but was working under foreman Donald Baker since shortly before his discharge. When he had been approached to sign a card, he asked Wicker what he should do; Wicker told him to make up his own mind. He had also been questioned by Gary Pace in regard to his knowledge of union activity and card signing.

On the morning of July 8, White was discharged, allegedly for leaving his work station on the wall prior to the start of the lunch period. Fred Wicker, who had been reinstated from his own "disloyalty" discharge several days earlier, testified that on that morning, Barfield told him to fire White because White was involved with the Union. Wicker assured Barfield that White was not so involved. Barfield insisted, saying that the orders had come from personnel. Wicker refused to do it. Barfield suggested that he talk with Baker and his leadman, Bigham. Wicker did so and Baker agreed to discharge White. Initially, they considered discharging

White for a safety violation, but observation of White showed him to be in full compliance with all safety requirements. Baker then stated that he would discharge White for leaving before the 11 a.m., dinner break.

Shortly thereafter, Wicker warned White that he was going to be discharged for coming off the wall too early. White stated that he would be careful to remain on the wall until after 11 a.m., but Wicker told him it would not help. According to both Wicker and White, no 11 o'clock whistle blew; White waited about 7 minutes after the others had left the wall and then came down. Notwithstanding that he had not left the wall early, Baker was waiting and discharged him. White's termination appraisal, signed by Baker, rated White as doing "More Than Expected" in all job performance factors and recommended him for rehire.

Following the discharge, according to Wicker and White, they got together and Wicker suggested that White take his discharge to the Labor Board. They contacted and met with Donald Baker to see if he would support White's charge. In their meeting, Baker refused to help them but confirmed that White had been discharged because of Respondent's belief that he had engaged in union activity.

On the next day, Wicker was taken to project manager Crowder's office by Terry Bishop. He met with, Crowder, Jesse Sellers and others. Sellers told Wicker that he had heard that Wicker had been messing around with White. Wicker protested that it was none of their business whom he associated with. Sellers made a reference to Wicker's call to Baker and told Wicker that they were not going to tolerate anymore union activity, that "If we hear anymore of it, somebody's going."

Baker and Barfield directly controverted Wicker's testimony. Barfield denied that there was any advance de-

cision to discharge White and he denied telling anyone to discharge White. Baker, who like Wicker had been discharged for disloyalty and then reinstated, testified that he had been warned by his superintendent, Sellers, to correct a problem of the employees leaving their work stations prior to the dinner whistle, that he had warned all of his men about this several times, and that on the day of White's discharge, he made a point to watch when his men left the wall, intending to make an example of anyone who left early. He stated that he got to the ladder 15 or 20 minutes before the dinner period and, as soon as he got there, saw White descending. He waited to make sure that White was not on some legitimate mission, saw him go to his lunch box, and discharged him. Baker said that the problem with White's early lunches had been no greater than with the other employees, but on this day, only White left early. Baker further testified that about a week later, he met with Wicker and White. Wicker asked him to go to the Labor Board and testify that he had discharged White for union activity. He refused and denied having done so.

Although Crowder, Sellers and Bishop all testified in Respondent's behalf, Wicker's testimony of the meeting in Crowder's office following his conversation with Baker is uncontroverted. Other than this evidence, the testimony concerning White's discharge stands in diametric opposition. Baker was a firm and forceful witness; so too was Barfield, at least in regard to this area of testimony. I was less impressed by White's recollective abilities. Wicker, I find, harbored some animosity toward Daniel arising from its refusal to pay him backpay for the period prior to his reinstatement and from his subsequent termination. However, Baker's testimony must also be considered in light of his recent (at the time of White's discharge) reinstatement and continued employment by Respondent. Considering all of the foregoing,

noting that White had not engaged in any union activity, and deeming it improbable both that Barfield would have asked Wicker to discharge an employee who was working on someone else' crew and that the dinner whistle would fortuitously fail on the day chosen to discharge White, I credit the testimony of Baker as corroborated by Barfield.

John Jaynes was an ironworker on Gene Cassidy's rigging crew. He was a union member and his union affiliation was known to both Cassidy and his general foreman, Ralph Eldreth.

As previously discussed, Jaynes had been questioned about the card solicitations around the beginning of June. On Tuesday, July 13, Jaynes had another conversation about the Union, this time Cassidy spoke to him, with Eldreth present. According to Jaynes, Cassidy told him, "that he had gotten the word that there were still union members on that job, and they were to be gotten off of there by that Friday," . . . that he was told to "tail them, find anything wrong with them, breaking the safety rules, wrong with their work, and fire them . . ." Cassidy told Jaynes that he did not want to fire Jaynes, that he was satisfied with Jaynes' work, and that no one had complained about his work since he had been there. Jaynes told Cassidy that he would make his decision that night and might not come back.

When Jaynes left work that night, he decided that he would save himself the embarrassment of a discharge and not return. He did not return until a week later, when he picked up his pay and his termination record. That record reflects that he was terminated July 14, for "Failure to Do Assigned Duties."

Cassidy denied making the statements attributed to him by Jaynes. He testified that Jaynes had a habit of wandering away from his work area and that he had

complaints from other foreman that Jaynes was not around when needed. He had mentioned these derelictions to Roger Benton, the ironworker superintendent, when Benton had asked for a recommendation on Jaynes, about 2 weeks before Jaynes' discharge. Benton did not direct that Jaynes be discharged upon receipt of Cassidy's recommendations, only that Cassidy discharge him if he caught Jaynes in similar misconduct. Cassidy did not discharge Jaynes; neither was he involved in that discharge. He corroborated Jaynes' testimony that Jaynes left the site and never returned.

Ralph Eldreth, Jaynes' general foreman, also testified about complaints concerning Jaynes. However, he did not discuss Jaynes' alleged shortcomings with Benton. Eldreth did not make the decision to discharge Jaynes and was not familiar with any of the events surrounding Jaynes' termination. Benton told Eldreth to discharge Jaynes for failure to perform assigned duties and that is what Eldreth wrote on the termination form. Eldreth did not know whether Jaynes was at work on the night of his discharge. Eldreth neither affirmed nor denied being present at a conversation between Jaynes and Cassidy on July 13.

Considering the foregoing testimony, the demeanor of the witnesses, the absence of Benton as a witness on Respondent's behalf, and the failure of Eldreth to deny his presence at, or the contents of, the alleged conversation between Jaynes and Cassidy, I credit Jaynes.

J. *Alleged Refusals to Hire*

Joe C. Lamb, a long-time member of Local 413, made application for employment as a welder on June 2. He filled out an application and was interviewed inside the gate. The interviewer, whom he could describe but not otherwise identify, asked him about his work qualifica-

tions. Lamb stated that he had worked in "organized labor" for about 12 years and named 2 or 3 of his employers. The interviewer asked him if he would be interested in "dropping his book" if he went to work for them and whether he would agree not to talk about organized labor on the job. Lamb stated that he could agree to the latter but not the former condition. Lamb was told that they would contact him; he received no call.

Around the first of August, upon information from the State Unemployment Office that Daniel might be hiring again at Sumner, Lamb returned to the site. He filled out an application, which named some of his former employers, and was again told that they would get back to him.

Respondent presented no witnesses in regard to Lamb's testimony. It was asserted that no applications from Lamb could be found.

Kenneth Earls is the brother of Johnny Earls, one of the supervisors whom Respondent discharged for engaging in union activity. Unlike his brother, Kenneth Earls was not a union member. In mid-June, Kenneth Earls applied for a rod buster position at the Sumner site. He gave his completed application to the timekeeper, observed the timekeeper look at a piece of paper and was then told that Respondent was not hiring rod busters at that time.

On the following weekend, Kenneth Earls called Bobby Pugh, a rod buster superintendent with whom he was familiar, and told Pugh that he had unsuccessfully applied for work at the site. Pugh told Earls, "The reason that he felt that they didn't hire me was on account of they had a list with my brother's name on there; and I was Earls and they must have felt that I had something to do with the Union. . . that he would have hired me if he

could have but they had that list, and they felt that I had something to do with the Union, and so they didn't hire me. "Pugh told Earls that the list named people who had something to do with the Union. He also told Earls that they needed men and were hiring.[36]

Kenneth Earls had worked for Daniel on a number of occasions. The last time was in 1975, at the Sumner site. His last period of employment was brief; Earls quit after less than 2 days to take a job closer to home. His termination was for failure to perform assigned duties.[37]

Charles Huffstetler was a journeyman ironworker and union member. On October 8 or 9, together with Steward Chadwell, his brother-in-law, Huffstetler applied for work at Sumner. They were told that applications were not being taken. They returned on Monday, October 11, when applications were being accepted. They completed and submitted theirs. Huffstetler's application listed unionized jobs as his references. They were questioned by Bill Burns and told him that they had tools, that Huffstetler had experience in various kinds of ironworker jobs, and that Chadwell had no experience. Chadwell was offered a job at $4 per hour with an opportunity to go to school at night for which he would receive an additional $.25 per hour. He declined the job. No job was offered to Huffstetler.

Frank Walker testified that Respondent hires helpers and that the helpers have an option of going to night school, for which they receive a further incentive pay-

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[36] Pugh, whose supervisory status was admitted, did not testify. Thus, Kenneth Earls' credibly offered testimony stands uncontradicted.

[37] In its brief, Respondent speculated that Kenneth Earls was denied employment because of the nature of his prior termination. No evidence was adduced in support of this argument.

ment. The rate of pay and the schooling opportunity offered Chadwell indicated that he had been offered a helper's position.

Respondent's labor turnover report for October established that 104 reinforcing ironworkers were hired in that month; the complement increased from 247 to 329. An additional 57 structural ironworkers were hired, raising the complement, after attrition, from 256 to 275. The report does not establish when in October the employees were hired.

V. Analysis and Conclusions

A. *Section 8(a)(1) Violations*

1. *Interrogation*—General Counsel has contended that Respondent's systematic questioning of its ironworker employees, ostensibly to determine the extent of supervisory participation in the organizational campaign, failed to comply with established Board guidelines and constituted unlawfully coercive interrogation. I agree. Based upon the facts set forth *supra*, and noting, *inter alia*, that White's testimony stands undenied, I find that in at least some of the interviews, Respondent failed to inform the employees of the purpose of its questions, or failed to confine its questions to the involvement of supervisors in the organizational activities. Moreover, Respondent's printed questions were too far, asking the employees whether they had signed a card. I note further that, according to the testimony of both Crowder and Johnson, the questioning occurred in the context of hostility to union activities, began prior to the filing of the representation petition and continued long after the union activists among the supervisors were discovered and discharged. Thus, while Respondent may have had some legitimate purpose in card solicitations inquiry, arising out of the supervisory participation in card solicitations and the filing of the petition, I find that it went beyond the permis-

sible scope of such an inquiry. Accordingly, I find that by this coercive interrogation, Respondent has violated Section 8(a)(1) of the Act. *P.B. and S. Chemical Company*, 224 NLRB 1 (1976); *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964). See also *Retired Persons Pharmacy, t/a NRTA-AARP Pharmacy*, 210 NLRB 443 (1974), enforced 519 F. 2d 486 (C.A. 2, 1975) and *N.L.R.B.* v. *Camco, Inc.*, 340 F. 2d 803 (C.A. 1965).

I futher find that when foreman Gene Cassidy asked Derrell Rice whether he was still a member of the Charleston local, Respondent coercively interrogated Darrell Rice, in violation of Section 8(a)(1). Similarly, I find, Respondent must be held responsible for its interviewer's question and statements to Joe Lamb, asking him whether he would drop his "book" and agree not to talk union on the job. While Lamb could not name that interviewer, it is clear from the record in this case that those who interview job applicants at Respondent's gate are clothed with apparent authority to speak for Respondent. Moreover, few circumstances could render interrogation and other antiunion statements more coercive than that of the employment interview, when the prospective employee approaches as a supplicant.

2. *Threats*—The credited evidence, much of which was undenied, established that on a number of occasions, Respondent's agents told employees or prospective employees that the union activities were or would be the cause of discharges or refusals to hire. Such statements clearly constitute threats to the employees' job security in the event that they engage in union activity, and coercive employees in the exercise of their Section 7 rights. Thus, I find that by the following conduct, Respondent has violated Section 8(a)(1) of the Act: Adkins' statement to Peterson and Whitson that the whole crew was going to be laid off be-

cause of union problems; Raines statement to Collins, when Collins applied for employment, that Collins would have to wait until the situation was straightened out at Sumner and that he could not start work immediately because they had to check him out; the statement overheard by Jake Kluttz at the time of his termination, referring to Kluttz as a union ringleader who had to be removed from the site; Jesse Sellers' statement at the safety meeting wherein he blamed the union activity for the absence of some ironworkers and predicted that more would be terminated subsequently for the same reason; foreman Hick's statement to Porter that the Union, not a safety violation, was the real reason for his discharge; Harris' implication to Queen that there was another reason for his discharge, that reason being union activities; Byce's similar statement to Smith Byce's statement to his crew to the effect that if the job went union, all nonunion employees would be terminated; Barfield's statement to Richard Dickey that his reemployment would have to wait until the "union mess" was cleared up; Cassidy's statement to Jaynes that there were still union men on the job and that supervision had orders to find excuses to discharge them; and, Pugh's statement to Kenneth Earls, informing him that he was not being hired because of a suspicion that he was tainted by his brother's union activity.

3. Requested surveillance—It was undenied that Gary Pace sought from Curley Peterson a promise that Peterson would report any union activities he observed if he were rehired. Such conduct is clearly unlawful. As the Eighth Circuit observed in *N.L.R.B.* v. *Louisiana Mfg. Co.*, 374 F. 2d 696, 700-701 (C.A. 8, 1967), when an employee is asked to report other employees' union activities to management, he "may naturally assume that for an employer to go to such lengths, some punishment must be in store for union supporters . . . Consequently, he will not feel free to make his own union sentiments known to other

employees, even in confidence, nor will he freely enter organizations of other employees for fear that one or more fellow employees will be following the wishes of their employer by spying upon and reporting his union activity." See also *Hyster Co.* v. *N.L.R.B.* 480 F. 2d 1081 (C.A. 5, 1973), enf'g in part *Hyster Company*, 198 NLRB 192 (1972).

4. *Kerr's Transfer to the Night Shift*—General Counsel contended that Kerr's transfer to the night shift in late May was intended to force him to quit, because of his union activities. I agree. There is evidence in Whisennant's testimony and in the case of Richard Dickey that Respondent utilized such a technique to terminate those employees it deemed undesirable. Additionally, general foreman Hackard's statement to Kerr, that he still had a job if he wanted it, but on the third shift, is some evidence that Hackard expected him to quit when forced to transfer. And, no explanation was offered for the transfer or for the selection of Kerr and the one other employee similarly transferred. These factors, when considered in light of the other discharges for union activity, albeit of supervisors, occurring at that time, and Respondent's clear union animus, lead me to conclude that this was an attempt to force Kerr to quit, because of his union activities, in violation of Section 8(a)(1) of the Act.

5. *The Discharge of Supervisors*—The evidence, *supra* establishes that all of the supervisors whom Respondent discharged for engaging in union activity, except Michael Johnson, had engaged in such activity. Their involvement was in varying degrees, from the actual leadership of the campaign (Tucker and Steen), to solicitations of employees to sign authorization cards (Earls and William Dickey), to the mere signing of an authorization card while occupying a supervisory position (McCarver, Wicker, McCutcheon, Grant, Allen Haga, and Daniel Haga).

Respondent contended that there can be no finding of an unfair labor practice upon the discharge of a supervisor for that supervisor's union activities. In the circumstances of this case, I agree.

The basic proposition governing this aspect of the case is that the protection of the Act runs only to employees, not supervisors, and a discharge of a supervisor for engaging in union activities does not violate the Act. *Bea Moreley's Mousetrap*, 174 NLRB 1060 (1969). It is only in certain limited circumstances, where the discharge of a supervisor interferes with employee rights, that such a discharge becomes unlawful. Such cases include the refusal of a supervisor to commit an unfair labor practice, *Talladega Cotton Factory, Inc.*, 106 NLRB 295 (1953), enf'd *N.L.R.B.* v. *Talledega Cotton Factory, Inc.*, 213 F.2d 208 (C.A. 5, 1954), adverse testimony in a Board proceeding by a supervisor, *Better Monkey Grip Company*, 115 NLRB 1170 (1956), enf'd *N.L.R.B.* v. *Better Monkey Grip Company*, 243 F.2d 836 (C.A. 5, 1957), or a supervisor's interference with his employees' unlawful scheme as by revealing to an employee the employer's plan to discriminatorily discharge him, *Buddies Super Market*, 223 NLRB 950 (1976). On the other hand, the Board has held that the discharge of a supervisor for refusing to adequately support his employer's antiunion campaign, where the supervisor was not required to engage in any unlawful activity, does not violate the Act. See *Western Sample Book and Printing Co.*, 209 NLRB 384 (1974). In that case, 3 supervisors were discharged because they failed to report on the union activities of the employees whom they supervised, conduct regarded by the employer as displaying union sympathies and disloyalty.

General Counsel points out that all of the supervisors involved herein had a close bond with the journeymen ironworkers because of the nature of the construction industry, wherein, as here, individuals shift from journey-

man to supervisor between jobs and while working on a single job. They were, nonetheless, statutory supervisors and generally outside the ambit of the Act's protection. He further argues that in view of Respondent's numerous other unfair labor practices, "the firing of supervisors for union activities or for prounion feelings was an integral part of a pattern of conduct aimed at penalizing employees for their union activities," in violation of Section 8(a)(1). The cases cited by General Counsel in support of this broad proposition are, I believe, inapposite. Thus, in *Donelson Packing Co., Inc.*, 20 NLRB 1043 (1975), while the Board used the language quoted above, it was pointed out that the supervisor's discharge "was caused at least in part by [his] attempt to procure" the reinstatement of an employee unlawfully laid off. Similarly, in *Key West Coca Cola Bottling Company*, 140 NLRB 1359 (1963), the supervisor's discharge was occasioned by his failure to cooperate with the employer's unlawful scheme to discharge employees for their union activities. In the instant case, there is no probative evidence that any of the supervisors were discharged for such a reason. General Counsel further cited *Fairview Nursing Home*, 202 NLRB 318 (1973). In that case, however, as was pointed out by Board Member Penello, the discharges were not motivated by the prounion activities of the supervisors. Respondent was not even aware of the supervisors' card signing at the time that it simultaneously discharged the supervisors and the employees.

General Counsel further argued that, in the cases of Michael Johnson and Michael Grant, their discharges were in violation of Section 8(a)(1) because they were discharged in conjunction with their respective crews. In support thereof, *Pioneer Drilling Co., Inc.*, 162 NLRB 918 (1967), enf'd 391 F.2d 961 (C.A. 10, 1968) and *Krebs and King Toyota, Inc.*, 197 NLRB 462 (1972) were cited. In *Pioneer*, however, the discharges were found unlawful because the supervisors had been termin-

ated as a means of eliminating the crews on which the union activity was centered. Neither Johnson nor Grant were terminated in order to justify the elimination of their crews. Neither were they terminated because their department or crews were eliminated, as was essentially the situation in *Krebs and King*. They were discharged because of Respondent's belief that they had personally engaged in union activity. Moreover, I note that while the complaint alleges that the members of Johnson's crew were discriminatorily laid off, the members of Grant's crew were not so named.

Michael Johnson's situation is, however, distinguishable from that of Grant and the other supervisors. The evidence which I have credited establishes that Johnson engaged in no union activity subsequent to his assumption of a supervisory position. His union activity occurred while he was still an employee and under the Act's protection. That protection must continue after he becomes a supervisor or it is rendered nugatory. Moreover, it could not help but discourage employee union activity to observe retribution being visited upon a supervisor for the protected activity engaged in while an employee, particularly where, as here, employees move freely and frequently from rank and file jobs to supervisory positions.

Accordingly, I find that the discharge of Michael Johnson violated Section 8(a)(1) of the Act. I further find that the General Counsel has not established that the discharges of the other supervisors alleged in the complaint violated the Act.

B. *The Section 8(a)(3) Violations*

1. The Alleged Reduction in Force

As discussed above, the complaint alleged that 7 employees terminated in an alleged reduction in force were actually terminated because of their union activity. The evidence, I find, supports this contention.

In reaching this conclusion, I have relied upon evidence, with which the record was replete, that Respondent bore substantial animus toward the organizational activities of its employees. I note also that each of these employees had engaged in union activity. That activity was either shown to be known to specific supervisors, or the knowledge thereof was evidenced by the inclusion of the employees' names upon the list shown Tice Randolph. Additionally, undenied testimony established that supervisors, such as Dean Bentley, made statements indicating that Respondent had the names of all the employees who had signed authorization cards.

Additionally, the record contains uncontradicted or otherwise credited evidence of supervisors admitting Respondent's unlawful motive. Thus, there is Adkins' statement to Peterson and Whitson that the crew was being laid off because of "union problems," Sellers' statement at the safety meeting to the effect that the absence of some employees was the result of the union activity and that more terminations would follow for the same reason, Rankin's statement to Tice Randolph, the list of those terminated at Sumner for union activities shown to Randolph by Rankin, the statement heard by Kluttz upon his termination, Pace's attempted extraction of a commitment from Peterson to report union activities after he was hired back, and Raines statement to Collins to the effect that Respondent was not hiring until they got matters straightened out.

Respondent contended that the June layoff was necessitated by a lack of work and poor productivity in June. Even assuming that it were, the evidence establishes that Respondent, in laying off an entire crew rather than cutting out the least desirable workers, failed to follow its customary practice. Moreover, the evidence fails to support a contention of economic necessity. The layoffs occurred in early June, before the June productivity

could have been known, and the employer had deemed the months of April and May to have been "highly productive" in the turbine area. When the June productivity reports became available, and productivity was shown to be down for the entire month of June, no additional layoffs were undertaken. Neither were there any additional layoffs in July, although productivity decreased even further. Indeed, while there was a decrease in the number of rebar ironworkers in June, the rebar ironworker complement was increased in July to approximately the same number as had been employed as of May 31, and it remained constant throughout August and September. In order to maintain this complement against normal attrition, there was substantial hiring. There had also been some hiring of ironworkers in June, although the laid off employees who applied were unsuccessful in securing reinstatement in that month. Finally, in this regard, I note the credited testimony of employees who observed that there was work to be performed at the locations from which they were laid off and elsewhere on the project.

Accordingly, I find that Respondent's claim of economic necessity was a pretext and that it laid off or otherwise terminated Curley Peterson, Max Whitson, Clyde Coggins, Marvin Kirk, Roy Collins, Tommy Johnson, and Jake Kluttz because of their union activity, in violation of Section 8(a)(3) of the Act.[38]

2. Discharges for Alleged Safety Infractions

Similarly, I find, as contended by General Counsel, that Respondent's reliance upon alleged violations of its

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[38] That Respondents' asserted reasons for these and subsequent discharges were false is additional evidence that the undisclosed reasons were unlawful. *Sinclair & Valentine Company*, 223 NLRB 1043 (1976).

safety rules to justify the discharges of 7 employees was pretextual.

In so concluding, I have relied, in part, upon the testimony of Curtis Whisennant, who was told that one of the ways to terminate union adherents was to find them in violation of safety rules, and upon the union animus abundant in this record. I have also relied upon the specific discharge incidents, each of which helps to color the others, and which, by their very nature, evidence the pretextuality.[39]

Gerald Kerr was discharged on June 11, allegedly for wearing his hard hat backwards. Hard hats were commonly worn in this manner by ironworkers and Respondent, while necessarily aware of this, did not deem this practice to be a serious safety violation or a dischargeable offense. Significantly, Kerr was discharged upon this trivial ground on the same day that Respondent took the affidavit of James Davis, which stated that Kerr had solicited him to sign an authorization card.

Equally trivial were the reasons assigned for the discharges of Paul Vincent and William Lominac. Vincent, I have found, only removed his glasses momentarily, to clean them, and was discharged. Lominac admittedly was not wearing his glasses, but wore total face and eye protection in the form of a welding shield. Respondent's safety engineer admitted that safety glass infractions were not, at least at the time of these discharges, considered dischargeable offenses. Moreover all three of these employees were discharged on the occasion of their first alleged safety violation, although it was Respondent's an-

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[39] The same evidence establishing Respondent's knowledge of the union activities of those employees discriminatorily terminated in the alleged reduction in force also establishes knowledge of the union activities of these employees and those to be discussed subsequently. No further repetition of that evidence is required.

nounced practice to give 2 warnings prior to discharge. And, they were discharged prior to Respondent's promulgation of a stricter safety program (which program still provided for a warning before discharge).

Steven Brandon admitted not wearing his safety glasses when discharged. However, noting that this infraction was not deemed so serious as to warrant discharge, was Brandon's first, occurred before the start of work, and that Brandon was first asked to quit or to provide another excuse to be fired, I deem Respondent's reason here, as in the other cases, pretextual.

Starks Porter, Kermit Roy, and Keith Queen were all discharged on the same day for the same alleged offense, failure to secure themselves with a safety belt while working above ground level. Both Porter and Queen, I have found, were told that the union activity, rather than the alleged safety rule infraction, was the reason for their discharges. Bishop, the assistant superintendent who directed Porter's discharge, admitted that he would not normally discharge an employee for a single infraction of this rule. Yet, there was no contention that Porter had received any prior warnings for this safety violation. Neither was there any contradiction of Porter's testimony that other employees around him were violating the same rule at the same time, and were not warned or disciplined. Neither Roy nor Queen had been in violation of Respondent's rules when terminated. Roy, like Brandon, was first asked to quit. After he refused, he was terminated. At the time he was called down, he had been climbing the iron and would not have been expected to be tied off. Queen had been working inside a wall, where tying off was not required, when he was called down and discharged.

Based upon all of the foregoing, I conclude that Respondent discharged Gerald Kerr, Paul Vincent, William

Lominac, Steven Brandon, Starks Porter, Kermit Roy and Wilbur Keith Queen in order to discourage union activity, in violation of Section 8(a)(3) of the Act.

3. Other Discharges

James Walker left the jobsite on May 20, for medical reasons, believing that he had a commitment for employment upon his return. The evidence, however, indicates that all he had was a statement that he was eligible for rehire. He admitted, moreover, that on his last day of employment he was told that he was being terminated for excess absenteeism. Walker reapplied on the same day that Respondent discriminatorily laid off a number of employees in his classification, and again a week later. On both occasions, he testified, he was told that union problems prevented Respondent from hiring rod busters. His testimony was uncontradicted; however, I note that he was unable to identify the person who made those statements. The record establishes that Respondent did not hire any rod busters at the time James Walker made his applications and there is no evidence to support the contention that had Respondent not been discriminatorily discharging employees at the time Walker sought to return, it would have offered him a job. Indeed, a job was offered to him on June 14, albeit a laborer's job at substantially less money. Based upon this state of the record, while I find the circumstances suspicious, I am unable to conclude that James Walker was discharged or denied reemployment because of his union activities.

The credited evidence establishes that after Derrell Rice took a vacation upon the subterfuge that he had to attend a funeral, he was discharged for excess absenteeism. This, I find, was cause which would have resulted in his discharge, without regard to union activity. That Respondent may have welcomed the opportunity to discharge Rice is not sufficient to establish that the dis-

charge was in violation of Section 8(a)(3). *Berland Paint City, Inc.*, 199 NLRB 927 (1972). As stated at page 928 of that Decision:

> If the employee himself obliges his employer by providing a valid independent reason for discharge—i.e., by engaging in conduct for which he would have been discharged anyway—his discharge cannot properly be labeled a pretext and ruled unlawful.

Additionally, noting that I have, for the most part, not credited Rice's testimony, that his testimony concerning his attempt to be reemployed at Sumner was not corroborated by an ostensibly available source, and further noting the ambiguous nature of the statement made to Rice when he and Chandler allegedly telephoned Benton about a job, I find that the evidence is insufficient to establish that Rice was denied reemployment because of his union activity.

Marvin Smith's discharge, I find, was patently pretextual. At the time of his discharge, Smith was where he was supposed to be, in the position he had to be in, in order to perform the work assigned to him. Miller, the supervisor who discharged Smith for alleged failure to perform assigned duties, admitted that on at least 2 of the 3 occasions when he made the observations which he claimed justified Smith's discharge, he could not have determined whether Smith was working properly or not. In view of the pretextual nature of this discharge, Smith's union activity, Respondent's knowledge of, and animus toward, such activity, and the testimonial absence of those who made the decision to discharge Smith, I find that Respondent discharged Marvin Smith because of his union activity, in violation of Section 8(a)(3).

In regard to Richard Dickey, analysis of the evidence leads me to conclude that both his July discharge and the

August forced termination were caused by Respondent's suspicions concerning his union activity and its desire to force his father, William Dickey, to quit. Thus, it discharged Richard Dickey in July for excess absenteeism, but not at a time when he was, in fact absent. Moreover, the credited evidence reveals that at least some of his absences were excused and his absenteeism record was no worse than that of other employees who were not discharged. No documentary evidence was adduced by Respondent to show when, or how often, Richard had been absent. It must inferred that had such records been produced they would not have supported a claim of excess absenteeism. Additionally, the credited evidence includes Barfield's tacit admission that Richard was being terminated because of his father, a statement that orders for his discharge originated in Greenville, not with his immediate supervision, and Barfield's statement that Richard could be rehired after the "union mess" was cleared up. Similarly, Richard's August termination, through a forced transfer to the night shift, came about on orders from Greenville and the antiunion motivation was established through Whisennant's credible testimony. Accordingly, I find that Respondent discharged Richard Dickey in July, and constructively discharged him in August, in order to discourage union activity, in violation of Section 8(a)(3).

As I have credited neither Olin White nor Fred Wicker in regard to the circumstances of Olin White's discharge, I find that there is insufficient evidence to support General Counsel's contention that White was discharged for union activity.

The evidence reflects that John Jaynes left work on July 13, with the intention of quitting, in order to avoid a threatened discriminatory discharge. Such a threat, I find, made continued employment intolerable. Jayne's leaving was therefore not voluntary. Rather, he was con-

structively discharged, in violation of Section 8(a)(3).[40] See *Tennessee Packers, Inc., Frosty Morn Division*, 143 NLRB 494 (1963), enf'd 339 F.2d 203 (C.A. 6, 1964). See also *Crystal Princeton Refining Company*, 222 NLRB 1068 (1976).

4. Refusals to Hire

When Joe Lamb applied for work on June 2, he was asked whether he would "drop his book" and agree not to talk union on the job. When Kenneth Earls applied, in mid-June, he observed the timekeeper refer to a piece of paper before telling him that no rod busters were being hired. Neither was hired. Earls was subsequently told by a foreman Bobby Pugh that Pugh believed that the company must have connected Kenneth with his brother Johnny Earls, whose name was on a list of union activists, and refused to hire him for fear that he, like his brother, was connected to the Union. Pugh also told him that they needed men and were hiring. There is no evidence that Pugh was involved in the decision not to hire Kenneth Earls or that his statement, coercive as it was, was more than speculation on his part. The record indicates that few ironworkers were hired in June, and none at the time of these applications. Accordingly, while I have found the statements to Lamb and Earls violative of Section 8(a)(1), and while I deem the circumstances suspicious, I must conclude that the evidence is not sufficient to sustain General Counsel's burden of proving that these applicants were denied employment

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[40] Alternatively, I would find that Respondent's discharge of Jaynes on the first day of his absence, for a reason other than absenteeism, upon orders of a superintendent 2 levels above his immediate supervisor, without discussion with either his foreman or general foreman, based at most upon a report of dereliction received 2 weeks earlier and not acted upon at that time, at least in the absence of some explanation by that superintendent, was pretextual.

because of their union activity or their relationship to persons known to have engaged in union activity.

On October 11, Charles Hufstetler applied for an ironworker job together with his brother-in-law, Chadwell. Hufstetler a union member, had extensive ironworker experience, and his application revealed employment at unionized construction sites. Chadwell had no experience in the craft. Chadwell was offered employment, but as a helper; Hufstetler was not offered employment.

General Counsel contended that Huffstetler was denied employment because of his union affiliation and employment history. Such a denial of employment would be consistent with Respondent's practice as credibly testified to by Curtis Whisennant. Further, Whisennant had identified Bill Burns as the individual from whom he received his instructions to screen out applicants with union backgrounds and it was Burns who interviewed Huffstetler and Chadwell. Burns did not testify. In view of this evidence, noting that Huffstetler was given an interview, which he probably would not have been given if ironworkers were not being hired, (as for example, when he earlier attempted to apply), and noting further that Respondent sent out telegrams seeking rod busters on October 12 and that there was considerable hiring in the ironworker classifications during the month of October, I must conclude, in agreement with General Counsel, that Charles Huffstetler was refused employment by Respondent because of his union affiliation and work experience, in violation of Section 8(a)(3) of the Act.

VI. Further Conclusions of Law

1. By coercively interrogating employees concerning their union activity and the union activity of other employees, by threatening employees with discharge, denial of employment opportunities or other reprisals because they or other employees have engaged in union activities,

by requesting employees to spy and report on the union actvities of other employees, and by transferring employees to less desirable shifts because of their union activities and in order to force them to quit, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them under Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

2. By discharging Michael Johnson, a supervisor, because he had engaged in union activities while still an employee, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them under Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

3. By discharging Curley Peterson, Max Whitson, Clyde Coggins, Marvin Kirk, Roy Collins, Tommy Johnson, Jake Kluttz, Gerald Kerr, Paul Vincent, William Lominac, Steven Brandon, Starks Porter, Kermit Roy, Wilbur Keith Queen, Marvin Smith, Richard Dickey, and John Jaynes and refusing to reinstate them, and by refusing to hire Charles Huffstetler, because of their union activities and in order to discourage union activity, membership, and support, Respondent has discriminated against them in regard to the hire and tenure of their employment, thereby violating Section 8(a)(3) and (1) of the Act.

4. The unfair labor practice enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not engaged in any unfair labor practices not specifically found herein.

VII. The Remedy

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1)

and (3) of the Act, it will be recommended that Respondent be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily discharged and refused to hire or reinstate Michael Johnson, Curly Peterson, Max Whitson, Clyde Coggins, Marvin Kirk, Roy Collins, Tommy Johnson, Jake Kluttz, Gerald Kerr, Paul Vincent, William Lominac, Steven Brandon, Stark Porter, Kermit Roy, Wilbur Keith Queen, Marvin Smith, Richard Dickey, John Jaynes, and Charles Huffstetler, Respondent shall offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and shall make them whole for any losses they may have suffered by reason of the discrimination against them.[41]

General Counsel and Respondent urged that the rate of interest to be paid on backpay be increased to 9 percent. The Board has recently considered this question, and, while modifying its interest formula, rejected the General Counsel's 9 percent argument. Accordingly, it is hereby recommended that interest on the backpay be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[42]

"A violation of Section 8(a)(3) goes to the very heart of the Act." It therefore warrants that Respondent be

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[41] Record evidence indicated that work on the Sumner project was expected to continue into 1979. It is thus appropriate, in accordance with the Board's usual practice, to leave to the compliance stage of this proceeding any questions as to whether particular employees would have continued working until completion or been laid off at some earlier time.

[42] See generally, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962).

further required to cease and desist from infringing *in any other manner* upon the rights guaranteed employees by Section 7 of the Act. *Pan American Exterminating Co.*, 206 NLRB 298, fn. 1 (1973); *Entwistle Manufacturing Company*, 23 NLRB 1058, enforced as modified, 120 F.2d 532 (C.A. 4, 1941).

In *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court (at pages 613-614) indicated that in "exceptional" cases, marked by "outrageous" and "pervasive" unfair labor practices, the imposition of a bargaining order, "without need of inquiry into majority status on the basis of cards or otherwise" might be an appropriate remedy if the unfair labor practices were of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had, the so-called "category one" case.[43] In reliance upon the *Gissel* "category one" language, and pointing to the extent of Respondent's antiunion campaign herein, the alacrity with which Respondent acted, the "devastating effect" that campaign had upon the unit employees, and Respondent's clear intent to defeat the union's organizational efforts through unfair labor practices and resultant delay, General Counsel argued for the imposition of a bargaining order herein without regard to any question of the Union's majority status.

General Counsel's argument is not without some appeal. Respondent's unfair labor practices were, indeed, outrageous and pervasive. See *The Loray Corp.*, 184

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[43] No such case was before the Court at that time however. The Court limited its holding to approval of the Board's use of a bargaining order in less extraordinary cases, marked by less pervasive practices which still tended to undermine the Union's *majority strength* and impede the election processes. In such "category two" cases proof of majority status was still a prerequisite for the issuance of a bargaining order.

NLRB 557 (1970). Those unfair labor practices, in conjunction with the timing of the Union's campaign and the scheduled completion of the project, could effectively prevent the employees' desires from ever being tested in an NLRB election. Nonetheless, I believe, the employees' desires and rights cannot be totally disregarded. In the instant case, because the Union relied upon supervisors to conduct its organizational campaign, the record is totally barren of probative evidence of employee support for the Union. Thus, while the imposition of a bargaining order might serve as a effective deterrent for this or other employers inclined to engage in such gross misconduct, it would totally disregard the rights of the employees to be consulted upon the question of representation.[44]

Neither the briefs of the parties herein nor independent research revealed any cases wherein the Board has applied the *Gissel* "category one" language to a situation wherein the Union never achieved majority status and ordered bargaining.

In *J.P. Stevens & Co.*, 179 NLRB 254 (1969), enf'd 441 F.2d 514 (C.A. 5, 1971), cited by General Counsel, the Board specifically found that the Union had attained majority status which was then dissipated by the employer's unfair labor practices. Subsequently, in *The Loray Corp., supra*, a situation remarkably like the instant case, the Board was faced with this precise question. Agreeing with the Trial Examiner's conclusion that the employer's conduct had been "outrageous" and

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[44] This is not to say that a bargaining order might not be appropriate were some substantial portion of the employee complement to have validly signified their choice for representation when their organizational activities were cut short prior to the acquisition of majority status. That difficult question must await resolution. See *Herbert Halperin Distributing Corporation*, 228 NLRB No. 30 (1976).

"pervasive," it held nonetheless that a bargaining order was not appropriate because there had been no proof of the union's majority status. See also *Grismac Corporation*, 205 NLRB 1108 (1973); *GTE Automatic Electric Inc.*, 196 NLRB 902 (1972).

While not granting a bargaining order in *Loray*, the Board did fashion additional remedial measures designed to deal with the extraordinary situation presented there. I believe that some of those remedial measures are equally necessary herein to dissipate the effects of Respondent's flagrant unfair labor practices and to assure that each employee is aware that he may exercise his statutory rights freely. Thus, in addition to the remedial measures set forth above, it is recommended that Respondent be required to: (a) have the attached Notice to Employees signed by Respondent's chief officer or agent at the Sumner site to counter the effect of unfair labor practices which had been ordered by high level supervision; (b) post that Notice at the Sumner site; (c) mail that Notice to the home address of all those who were or had been employed at Respondent's Sumner site since May 1, 1976, so that all employees, whether still employed, terminated or on layoff, vacation or sick leave, may read that Notice in noncoercive surroundings; (d) upon the request of the Union made within 1 month of this Decision, grant the Union and its representatives reasonable access to its bulletin boards and all places where notices to employees are customarily posted, for a period of 3 months; (e) and, supply the Union, upon request made within 1 year, with the names and addresses of its current employees, so that the Union may communicate with these employees, whose names and addresses it would be unlikely to know because of the high turnover and wide dispersion of the work force, in an atmosphere relatively free of restrain and coercion. These measures are required, I believe, as Respondent endeavored to totally eliminate the Union's presence from its site, and to prevent its return.

As it appears that Respondent may have made it impossible for the Union to obtain designations from 30 percent of the employees necessary to support a petition for an election in which employees may have an opportunity to express their free choice, it is recommended that upon a petition by the Union filed not more than 30 days following compliance herewith by Respondent, the Board conduct an election among Respondent's ironworkers at the Sumner site, a union appropriate for collective bargaining,[45] without requiring such a showing of interest.

Additionally, as the evidence established that Respondent made efforts to prevent the hiring at other Daniel's sites of those discriminatorily discharged at Sumner, I shall recommend that Respondent be required to post the attached Notice at each of its construction sites in the United States, so that the employees at those locations and their supervisors, will be made aware of employee rights under the Act.

The Union sought, by way of further extraordinary remedies, that it be awarded litigation and organizational expenses, pursuant to the Board Decision in *Tiidee Products, Inc.*, 194 NLRB 1234 (1972). However, while I have found Respondent's conduct herein to have been egregious, substantial portions of its defense were either debatable or meritorious. Therefore, it cannot be said that Respondent forced the Board and the Union into frivolous litigation, such as might warrant the imposition

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[45] The record, I find, establishes that these employees are a homogeneous group with a readily identifiable separate community of interest. The Sumner site is physically separated from the Fairfield project, there is separate supervision, independent hiring and termination, separate seniority lists and different policies in regard to the application of seniority, at least for layoff purposes, separate payrolls, different designations for the employees, and little, if any, interchange. They do, therefore, constitute *an* appropriate unit.

of costs. *Hecks, Inc.*, 215 NLRB 765 (1974). Accordingly, this requested remedy is rejected.

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[46]

ORDER

The Respondent, Daniel Construction Company, A Division of Daniel International Corp, its officers, agents successors, and assigns shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activity and the union activity of other employees.

(b) Threatening employees with discharge, denial of employment opportunities, or other reprisals because they or other employees have engaged in union activities.

(c) Requesting employees to spy and report on the union activities of other employees.

(d) Transferring employees to less desirable shifts because of their union activities.

(e) Discharging supervisors for union activity engaged in while still employees.

(f) Discouraging membership in or activities on behalf of International Association of Bridge, Structural and Ornamental Ironworkers, Local 413, AFL-CIO, or

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[46] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

any other union by discharging or refusing to hire or reinstate, or otherwise discriminating against employees in any manner with regard to their rates of pay, wages, hours of employment, hire, tenure or employment or any term or condition of employment.

(g) In any other manner interfering with restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Michael Johnson, Curley Peterson, Max Whitson, Clyde Coggins, Marvin Kirk, Roy Collins, Tommy Johnson, Jake Kluttz, Gerald Kerr, Paul Vincent, William Lominac, Steven Brandon, Starks Porter, Kermit Roy, Wilbur Keith Queen, Marvin Smith, Richard Dickey and John Jaynes immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, and offer Charles Huffstatler a job as an ironworker, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the Section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, master schedules and other production scheduling documents, and all other

documents necessary and relevant to analyze and compute the amount of backpay due under this Order.

(c) Post at its Sumner site, and all other construction sites within the continental United States, copies of the attached notice marked "Appendix."[47] Copies of said notice on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's chief officer or agent at its Sumner site, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(d) Mail copies of the attached notice marked "Appendix" to all those employees who have been or were employed at the Sumner site since May 1, 1976.

(e) Upon request of the Union, made within one month of this Decision's issuance, immediately grant the Union and its representatives reasonable access to its bulletin boards and all places where notices to employees are customarily posted, for a 3 month period.

(f) Upon request of the Union, made within one year of this Decision's issuance, make available to the Union a list of names and addresses of all ironworker employees currently employed.

(g) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[47] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER RECOMMENDED that the complaint be dismissed in all other respects.

Dated, Washington, D.C.

November 23, 1977

/s/ Michael O. Miller
MICHAEL O. MILLER
Administrative Law Judge

No. 80-1003

In the Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL CONSTRUCTION COMPANY, A DIVISION OF DANIEL INTERNATIONAL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner unlawfully interrogated employees about their support for the union.

2. Whether the Board properly found that petitioner unlawfully discharged a supervisor for union activity engaged in when he was a rank and file employee.

3. Whether the unfair labor practice complaint was properly amended.

4. Whether the Board's order directing that an election be held was proper.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Exber, Inc. v. *NLRB*, 390 F.2d 127	11
Hickmott Foods, Inc., 242 NLRB No. 177	12
Loray Corp., 184 N.L.R.B. 557	12
NLRB v. *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245	11
NLRB v. *Dinion Coil Co.*, 201 F.2d 484	11
NLRB v. *Fant Milling Co.*, 360 U.S. 301	11
NLRB v. *Gaynor News Co.*, 197 F.2d 719, aff'd sub nom. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17	10
NLRB v. *Gissel Packing Co.*, 395 U.S. 575	12
NLRB v. *P.A.F. Equipment Co.*, 528 F.2d 286	11
NLRB v. *P.B.&S. Chemical Co.*, 567 F.2d 1263	9
Universal Camera Corp. v. *NLRB*, 340 U.S. 474	9
Virginia Electric & Power Co. v. *NLRB*, 319 U.S. 533	12
Wisniewski v. *United States*, 353 U.S. 901	10

Statute and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 7, 29 U.S.C. 157	7
Section 8(a)(1), 29 U.S.C. 158(a)(1)	1, 7
Section 8(a)(3), 29 U.S.C. 158(a)(3)	1, 7
Section 9(c), 29 U.S.C. 159(c)	11
Section 10(b), 29 U.S.C. 160(b)	7

29 C.F.R. 101.18(a)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unreported. The decision and order of the National Labor Relations Board (B1-B3, C1-C75) are reported at 244 N.L.R.B. No. 106.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1980. The petition for a writ of certiorari was filed on December 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

The Board, adopting the decision of the Administrative Law Judge, found that petitioner, in reaction to the Union's [1] organizing campaign, violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, by coercively interrogating employees about their union activities; by threatening employees with reprisals for engaging in union activities; by requesting an employee to report on the union activities of other employees; and by transferring an employee to a less desirable shift because of his union activities (Pet. App. C50-C53). The Board further found that petitioner violated Section 8(a)(1) of the Act by discharging Supervisor Michael Johnson for union activity he had engaged in while still a non-supervisory employee (Pet. App. C56), and Section 8(a)(3) and (1) of the Act by discharging 17 employees and refusing to hire one employee because of their union activities (Pet. App. C56-C64).

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[1] International Association of Bridge, Structural, and Ornamental Ironworkers, Local Union 413, AFL-CIO.

The Board ordered petitioner, *inter alia*, to offer reinstatement to Supervisor Michael Johnson and each of the employees discriminatorily discharged or refused a job, and to make each of them whole for any earnings lost by reason of the discrimination practiced against them (Pet. App. C67). The Board's order also requires petitioner to give the Union: (1) immediate access to and use of its bulletin boards and all places where notices to employees are customarily posted, for a three-month period; and (2) a list of the names and addresses of all ironworkers currently employed by petitioner (Pet. App. C70). The order further specifies that, upon a petition by the Union filed not more than 30 days after petitioner's compliance with the Board's order, the Board will conduct a representation election among the ironworkers at the site involved herein, without requiring the normal showing of authorization cards signed by at least 30 percent of the ironworkers at that site (Pet. App. C71).

The court of appeals, in an unpublished *per curiam* opinion, upheld the Board's decision and enforced its order (Pet. App. A1-A4).

In this Court, petitioner contests the Board's findings that it unlawfully interrogated employees concerning the signing of union authorization cards and that it unlawfully discharged Supervisor Michael Johnson. Petitioner further contends that the unfair labor practice complaint regarding discharges of six employees was time-barred and that the Board improperly ordered an election to be held without requiring the customary showing of interest by the Union.

1. In early 1976, the Union decided to attempt to organize the ironworkers at petitioner's Sumner Nu-

clear Station and Fairfield Pump Storage projects near Jenkinsville, South Carolina (Pet. App. C4-C5). Thereafter, a number of union members and officers sought work at those sites. The Union established an organizing committee at the sites consisting of about 20 individuals, some of whom were employed as foremen (Pet. App. C5). The committee members started soliciting authorization cards from the employees in early May (*ibid.*).

Petitioner became aware of the Union's drive by late May (Pet. App. C6; A. 564-565).[2] Its attorneys immediately sent Employee Relations Manager Emmerson Johnson to Jenkinsville "[t]o help assess the situation to see how deep the Union had got in" and to ascertain the identity of the employees who had signed cards (Pet. App. C7; A. 599, 600). Petitioner's supervisors were instructed to report at once all union activity observed so that it could be "take[n] care of" (Pet. App. C7; A. 286, 289-290, 302, 310-311).

In late May, petitioner began to call individual employees to the Sumner Station personnel office for interrogation, ostensibly to determine the extent of supervisory participation in the Union's campaign (Pet. App. C-8; A. 268-270, 603, 727). The questioning was conducted by Personnel Administrator Walker, Employee Relations Manager Johnson, and Personnel Officer Gary Pace (Pet. App. C-8; A. 727-728). Petitioner's attorneys had given cards to these people to instruct them how to conduct the interviews and to ask the following questions (Pet. App. C9; A. 601, 727-728, 875):

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[2] "A." refers to the printed appendix in the court of appeals. Citations to the record are taken from the government's brief in the court of appeals.

1. Did any supervisor ask or attempt to persuade you to sign a union card?
(If "no," end the interview.)
2. What was said to you?
3. Did you sign a card?

Approximately 200 employees at Sumner were interviewed by mid-July (A. 605, 728).

Some employees were asked questions other than those listed on the interviewers' cards. Thus, Wilbur Keith Queen was asked if anyone (not just a supervisor) had pressured him to sign a card and whether he had seen anyone soliciting cards on the job (Pet. App. C8; A. 509-510). He was not asked whether any supervisor had urged him to sign (Pet. App. C8; A. 509, 521). John Jaynes was asked if he had signed a card and whether he knew the man who was distributing them. Jaynes admitted executing a card, but denied knowledge of the solicitor's identity. (Pet. App. C-8; A. 254, 263.) The interviewer told Jaynes that Sumner would not be a union job (Pet. App. C8; A. 254, 264). Roy Collins was asked where he obtained his card, in addition to whether he received it from a supervisor (Pet. App. C8; A. 268-269, 278-279, 280). Starks Porter was asked if anyone had pressured him to sign (Pet. App. C8; A. 491-492, 503-504). Olin White was asked whether he had been solicited to sign a card by anyone, whether the solicitor was a supervisor or a journeyman, and if he knew anyone who had signed a card (Pet. App. C8-C9; A. 404-405).

In late May and early June, petitioner discharged several of its supervisory personnel who had engaged in activity on behalf of the Union (Pet. App. C9-C13). Foreman Michael Johnson was one of those

terminated, even though he had not participated in union activity while a supervisor (Pet. App. C13). Johnson was initially hired as a journeyman ironworker in December 1975. He solicited authorization cards as a member of the Union's organizing committee and participated in other union activities until he was made a foreman on May 28, 1976. (Pet. App. C13; A. 372-373, 378.) All of the cards submitted as evidence and bearing his signature as a witness were dated between May 11 and May 19 (Pet. App. C13; A. 853-867).

On June 7, Johnson was terminated for "union activity" (Pet. App. C14). On June 11, petitioner obtained a statement from employee Darrell Wright. That affidavit, which contained only one reference to time, stated, "On a Tuesday right after the safety meeting a couple of weeks ago, * * * Mike Johnson asked me to sign a card. * * * Two or three days later * * * he asked me if I wanted to sign a card" (Pet. App. C13-C14 n.14; A. 839). Site Personnel Administrator Walker, who took Wright's statement, made no attempt to establish the exact date that Johnson spoke with Wright about a card. Petitioner neither talked to Johnson regarding this matter before discharging him nor attempted to find out whether he had solicited any cards or participated in any other union activities after he was promoted. (Pet. App. C13-C14 n.14; A. 377, 742-743.)

2. In finding petitioner's interrogations concerning the signing of authorization cards to be unlawful, the Administrative Law Judge rejected petitioner's assertion that its questioning was permissible in order to ascertain the scope of supervisory participation in the solicitation of cards (Pet. App. C50-C51):

> [I]n at least some of the interviews, [petitioner] failed to inform the employees of the purpose of its questions, or failed to confine its questions to the involvement of supervisors in the organizational activities. Moreover, [petitioner's] printed questions were too far, asking the employees whether they had signed a card. * * * [T]he questioning occurred in the context of hostility to union activities, began prior to the filing of the representation petition and continued long after the union activists among the supervisors were discovered and discharged. Thus, while [petitioner] may have had some legitimate purpose in card solicitations inquiry, arising out of the supervisory participation in card solicitations and the filing of the petition, I find that it went beyond the permissible scope of such an inquiry.

In addition, while agreeing with petitioner that it did not violate the Act by discharging supervisors who engaged in union activity (Pet. App. C54-C56), the Administrative Law Judge found that Michael Johnson's situation was different from that of the other supervisors (*id.* at C56):

> Johnson engaged in no union activity subsequent to his assumption of a supervisory position. His union activity occurred while he was still an employee and under the Act's protection. That protection must continue after he becomes a supervisor or it is rendered nugatory. Moreover, it could not help but discourage employee union activity to observe retribution being visited upon a supervisor for the protected activity engaged in while an employee, particularly where, as here, employees move freely and frequently from rank and file jobs to supervisory positions.

The Administrative Law Judge also rejected petitioner's contention that an amendment to the com-

plaint to include the unlawful discharge of additional employees was time-barred under Section 10(b) of the Act[3] (Pet. App. C4):

> The law is clear that "* * * an amended charge, although filed more than 6 months after the occurrence of the unfair labor practice, will be timely if it relates to the unfair labor practice inherent in or connected with the original charge." * * * The amendments name the employees discharged in the course of a single organizational campaign. As such, it is clear that they relate to the "unfair labor practice inherent in or connected with the original charge." [Citation omitted.]

Finally, in fashioning relief, the Administrative Law Judge rejected the General Counsel's request for a bargaining order (Pet. App. C68-C70). However, he did find that certain extraordinary measures were necessary "to dissipate the effects of [petitioner's] flagrant unfair labor practices and to assure that each employee is aware that he may exercise his statutory rights freely" (*id.* at C70). Among these

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[3] The original charge was filed on August 12, 1976, alleging that petitioner violated Section 8(a)(1) and (3) of the Act by discharging 15 named individuals on May 25 "and continuing to date" in order to discourage union activity (Pet. App. C3-C4). The charge also alleged that "[b]y these *and other acts*" petitioner had interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act (Pet. App. C4 n.3; emphasis added). Subsequent amendments to the charge on September 13, 1976, January 13, February 9 and 18, and March 8, 1977, retained identical language and added (or deleted) names on the list of discharged employees. Although petitioner contended before the Board that the allegations concerning 14 employees were time-barred (Pet. App. C3 n.2), it confined this contention in the court of appeals to six employees (*id.* at A3).

measures was the provision that an election be held without requiring the Union to make the customary showing of employee interest.[4] The Administrative Law Judge explained that this measure was appropriate because petitioner's unfair labor practices "may have made it impossible for the Union to obtain [the usual] designations from 30 percent of the employees * * *" (*id.* at C71).

3. The court of appeals affirmed and enforced the Board's order in all respects (Pet. App. A1-A4). The court found that "the ALJ's findings [on the unfair labor practice charges] are amply supported by substantial evidence" (*id.* at A3). It further determined that the "alleged offenses affecting the six individuals added by amendment [to the complaint] were clearly related to the substance and pattern of misconduct claimed in the original charge, so the Board acted properly in allowing the amendments" (*ibid.*). Finally, the court concluded that "[t]he several remedies ordered by the Board fell well within the Board's remedial powers" and, in particular, that the customary standard of a 30% showing of interest involves "an administrative decision not properly subject to judicial review" (*id.* at A4).

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[4] On June 2, 1976, the Union filed a petition seeking a representation election at the Sumner Nuclear Station in a bargaining unit consisting of all journeymen and apprentice ironworkers (Pet. App. C5-C6). The Union also mailed a demand for recognition to petitioner's corporate headquarters. On June 7, the Company's attorneys rejected that demand. (Pet. App. C6; A. 844.) On June 18, the Board conducted a hearing on the Union's petition and subsequently advised the Union that it needed 12 more authorization cards in order to satisfy the 30% showing of interest normally required to obtain an election (Pet. App. C6; A. 107-108). The Union was unable to secure the additional cards. As a consequence, the Board dismissed the petition on July 8, 1976 (Pet. App. C6).

ARGUMENT

The decision of the court of apeals is correct, turns on the particular facts of this case, and does not conflict with any decisions of this Court or of the other courts of appeals. Further review is therefore unwarranted.

1. Petitioner contends (Pet. 21-24) that its interrogation of employees concerning their signing of authorization cards was lawful because the questioning had a legitimate purpose, petitioner gave assurances against reprisals, and employee cooperation was voluntary, and that in any event no intimidation was shown. This contention merely challenges the Board's contrary factual findings that were sustained by the court of appeals and thus raises no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). At all events, the Board's findings are supported by substantial evidence. First, intimidation was proven here. As discussed above (see pages 3-6, *supra*), the interrogations were conducted in a "context of hostility to union activities" (Pet. App. C50) at a time when employees were being discharged for participating in union activities. Furthermore, the Board determined that petitioner exceeded the bounds of legitimate inquiry because it did not restrict its questioning to supervisory participation in the Union's campaign, it expressly asked employees whether they had signed authorization cards, and it continued its investigation after the Union's election petition had been withdrawn.[6]

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[6] *NLRB* v. *P.B.&S. Chemical Co.*, 567 F.2d 1263 (4th Cir. 1977), upon which petitioner relies (Pet. 21-23), is not in conflict, for the court in that case found no atmosphere of

2. Petitioner asserts (Pet. 11-13) that it discharged Johnson for engaging in union activities conducted while he was a supervisor. However, the Board's finding, upheld by the court of appeals, was that Johnson's union activities ceased when he became a supervisor and that petitioner had no good-faith basis for believing otherwise.[6] Again, petitioner's assertion raises only a factual issue that does not warrant further review.

3. Similarly, petitioner's contention (Pet. 14-17) that the complaint was improperly amended merely disputes the Board's finding, affirmed by the court of appeals, that the discharges of the six employees that were thereby added to the complaint related to the unfair labor practices alleged in the original charge.[7]

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intimidation. In any event, a claim of intra-circuit conflict would not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[6] The Administrative Law Judge specifically concluded (Pet. App. C13) that "there is no probative evidence to contradict [Johnson's] testimony" that he had not engaged in union activity after his promotion. In particular, the Administrative Law Judge found (*id.* at C13-C14 n.14) that the affidavit assertedly relied on by petitioner (Pet. 12), which was obtained *subsequent* to Johnson's discharge, did not establish that Johnson had participated in union activity after he became a supervisor.

[7] Petitioner concedes (Pet. 14), on the basis of *NLRB* v. *Gaynor News Co.*, 197 F.2d 719 (2d Cir. 1952), aff'd sub nom. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 34 n.30 (1954), that a complaint may properly be amended to include events that occurred more than six months before the date of the amendment if the new charge relates back to the original charge. However, petitioner incorrectly asserts (Pet. 15-16) that the *Gaynor* rule applies only where the facts are identical. On the contrary, *Gaynor* has been applied to situations where, as here, the new charges involved additional allegations of

All of the affected employees were discharged for participating in a single union organizing campaign. The court of appeals thus properly concluded that the unfair labor practices involving these six individuals were "clearly related to the substance and pattern of misconduct claimed in the original charge" (Pet. App. A3).

4. Finally, there is no merit to petitioner's contention (Pet. 17-21) that the Board improperly ordered an election without requiring the Union to secure authorization cards from 30% of the employees. The Board has established the 30% criterion for its own administrative purposes in determining whether there is "a question of representation" under Section 9(c) of the Act, 29 U.S.C. 159(c). As the court of appeals correctly held (Pet. App. A4), "a 'showing of interest' is an administrative decision not properly subject to judicial review." See also, *e.g.*, *NLRB* v. *P.A.F. Equipment Co.*, 528 F.2d 286, 287 (10th Cir. 1976); *NLRB* v. *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 250 (5th Cir. 1964).

In any event, the Board's regulations expressly provide that the 30% standard can be waived when the Board determines that "special factors" exist. See 29 C.F.R. 101.18(a) (Pet. 5). Here, the Board properly concluded that petitioner's extensive misconduct had made it impossible for the Union to obtain the authorization cards normally required to secure an elec-

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unlawful discharges. *NLRB* v. *Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952); *Exber, Inc.* v. *NLRB*, 390 F.2d 127, 129 (9th Cir. 1968). See also *NLRB* v. *Fant Milling Co.*, 360 U.S. 301 (1959).

tion. See *Loray Corp.*, 184 N.L.R.B. 557 (1970).[8] Moreover, allowing the ironworkers at Sumner to cast secret ballots in a fair election, free from the fear of reprisals by petitioner, will finally determine whether a majority of those employees want union representation. The Board's decision to afford them that opportunity is well within its broad discretion to fashion remedies for unfair labor practices. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

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[8] The Administrative Law Judge expressly found that petitioner's "unfair labor practices were, indeed, outrageous and pervasive" (Pet. App. C68) and that its violations were "flagrant" (*id.* at C70). In adopting the Administrative Law Judge's decision, the Board reiterated that petitioner's unfair labor practices were "massive and pervasive" (*id.* at B2 n.2) and that it had "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights" (*id.* at B3 n.3, quoting *Hickmott Foods, Inc.*, 242 N.L.R.B. No. 177 (1979)). And, as the court of appeals held (Pet. App. A3), these findings "are amply supported by substantial evidence."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
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